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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1136

WERNER ERNEST ENSKAT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five.

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WERNER ERNEST ENSKAT,

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PEOPLE OF THE STATE OF CALIFORNIA,

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five.

Petitioner, Werner Ernest Enskat, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five, entered in the above entitled case on August 8, 1973.

Opinions Below.

The opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five, rendered on August 8, 1973, is reported in 33 Cal.App.3d 900, 109 Cal.Rptr.433. A copy of the opinion appears in Appendix A hereto. The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles and the order of the Appellate Department of the Superior Court of the State of California

for the County of Los Angeles, certifying the cause to the Court of Appeal in and for the Second Appellate District, rendered on October 12, 1972, are not reported. A copy of the opinion and order appear in Appendix B hereto. The prior opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, rendered on September 21, 1971, is reported in 20 Cal.App.3d Supp. 1, 98 Cal.Rptr.646. A copy of the opinion appears in Appendix C hereto.

Jurisdiction.

The judgment of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five (App. A) was entered on August 8, 1973. A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was denied on October 24, 1973. A copy of the order denying the petition for hearing by the California Supreme Court appears in Appendix D hereto. The judgment of the Court of Appeal, as aforestated, is a final judgment, and jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction herein, violate the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of this Court rendered on June 21, 1973, in *Miller v. California,* 93 S.Ct.2607; *Kaplan v. California,* 93 S.Ct.2680; *Paris Adult Theatre I v. Slaton,* 93 S.Ct.2628; *United States v. Orito,* 93

S.Ct.2674; and *United States v. 12 200-Ft. Reels*, 93 S.Ct.2665.

2. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, including the "utterly without redeeming social importance" test, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of this Court rendered on June 21, 1973.

3. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, on their face and as construed and applied to authorize the judgment of conviction herein, without the use of a national community standard test which at the time of the trial of the petitioner limited state obscenity prosecutions, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of this Court rendered on June 21, 1973.

4. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, and which do not specifically define sexual conduct purportedly subject to regulation, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and

the aforesaid decisions of this Court rendered on June 21, 1973.

5. Whether the court below, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid interpretive decisions of this Court rendered on June 21, 1973, erred in holding that the state obscenity statute did not require specifically defined sexual conduct so long as the *Memoirs* tripartite standards for judging obscenity were retained, including the test of "utterly without redeeming social importance".

6. Whether the court below, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid interpretive decisions of this Court rendered on June 21, 1973, erred in holding that the state obscenity law, which solely embodies the *Memoirs* test as authoritatively construed by the highest court of the State, nevertheless satisfies the *Miller* prerequisites for specifically defined sexual conduct, because prior decisions in application of the statute to particular materials had referred to "hard-core" pornography and "graphic description of sexual activity" as material not entitled to constitutional protection.

7. Whether the court below, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid interpretive decisions of this Court rendered on June 21, 1973, erred in holding that the state obscenity law, which solely embodies the *Memoirs* tripartite standards for judging obscenity, and which contains no specifically defined sexual conduct subject to regulation, nevertheless satisfies the principles enunciated by this Court

in *Miller* and the related decisions, upon the ground that the state law is not unconstitutional under those decisions, but merely more stringent for prosecutorial enforcement.

8. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the jury herein to disregard competent expert evidence offered by petitioner on his behalf on the issue of contemporary community standards, and to decide the issue solely on the basis of the individual juror's own standard, violate the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid interpretive decisions of this Court rendered on June 21, 1973.

9. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to the motion picture film herein involved and its exhibition on September 19, 1970, violate the free speech and press and due process provisions of the First and Fourth Amendments and the aforesaid interpretive decisions of this Court.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code §§311 and 311.2 appear in Appendix E hereto.

Statement.

Petitioner was charged with two counts of violating California Penal Code §311.2 by the exhibition at the Avon Theatre in the County of Los Angeles on September 19, 1970, of motion pictures entitled "The Collection" and "Man to Man". Following a trial by

jury, petitioner was convicted with respect to the film "The Collection", and was acquitted with respect to the film "Man to Man". On appeal, the judgment of conviction was reversed and the cause remanded for a new trial because secondary evidence of the film's contents had been improperly admitted (App. C). A subsequent retrial again resulted in conviction and appeal was once more prosecuted to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The judgment of conviction was affirmed (App. B). The Appellate Department, however, certified that a transfer of the appeal to the Court of Appeal appeared necessary to settle new and important questions of law (App. B). On October 24, 1972, the Court of Appeal ordered that the case be transferred to Division Five and the case was submitted for decision by order of the Court of Appeal on May 31, 1973. Thereafter, on July 6, 1973, a communication was received from the Court of Appeal to respective counsel, reading as follows:

> "After studying the recent United States Supreme Court opinions on the subject of obscenity (Miller v. California, 41 L.W. 4925, et al.,) the court has come to the conclusion that fairness to all concerned demands a reargument of this case. It has been set down for July 25, 1973, at 2:30 p.m.
>
> "The court has asked me to advise you that it is most definitely not requesting a reargument on issues already presented and argued. It is, however, interested to what extent—if any—the *Miller* decisions affect the pending appeal."

Accordingly, there was further briefing and argument before the Court of Appeal and an ultimate ruling by

the Court affirming petitioner's judgment of conviction (App. A).

A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was denied on October 24, 1973 (App. D).

How the Federal Questions Are Presented.

Prior to trial, the petitioner demurred to the complaint, alleging, among other grounds, that the state obscenity statutes, on their face and as construed and applied by the complaint, were unconstitutional, null and void, violating the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution. The demurrer was overruled. During the trial, motions for judgment of acquittal, for new trial, and in arrest of judgment, based on the said constitutional objections to the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied, were all denied.

On appeal to the Appellate Department from the initial conviction, the petitioner again raised the constitutional invalidity of the said provisions of the state obscenity laws upon the grounds that the statutes, on their face and as construed and applied to the petitioner and the film involved in the case, violated the free speech and press, due process, and equal protection provisions of the federal and state Constitutions. The judgment of conviction was reversed upon the ground that the prosecution had not complied with the best evidence rule, the prosecution having only offered the oral testimony of two police officers with respect to the contents of the film, without any explanation for its absence (App. C).

The same constitutional objections were pursued on pretrial motions to dismiss at the second trial and for motions for judgment of acquittal made through the trial.

On appeal to the Appellate Department from the second conviction, the petitioner again raised the questions with respect to the constitutional invalidity of California Penal Code §§311 and 311.2, on their face and as construed and applied to the film here involved, under the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments. The petitioner also contended that the trial court's instructions on the issue of contemporary community standards violated the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution. The trial court had instructed the jury that "should you first find that the conduct in question, from all the evidence and beyond a reasonable doubt, is so patently offensive as to violate any conceivable community standard, evidence of community standards is unnecessary; and expert testimony need not be considered upon this issue". [R.T. 685]. It was also contended on appeal that the provisions of the state obscenity laws, as construed and applied to authorize the judgment of conviction, solely upon the basis of a state standard, instead of a national standard, violated the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed petitioner's judgment of conviction, one judge dissenting upon the ground that the trial court's instructions with respect to petitioner's expert testimony

had resulted in a deprivation of petitioner's liberty without due process of law. On the same day that the opinion and judgment of the said Appellate Department was rendered, the court made its order, as aforesaid, certifying the cause to the Court of Appeal (App. B). By order of the Court of Appeal of the State of California for the Second Appellate District, Division Five, the appeal pending in the Appellate Department was transferred to the said District Court of Appeal, Division Five, and thereafter oral argument on all the issues presented was made before the Court of Appeal on June 21, 1973.

On June 21, 1973, this Court rendered its decisions in *Miller v. California,* 93 S.Ct.2607; *Kaplan v. California,* 93 S.Ct.2680; *Paris Adult Theatre I v. Slaton,* 93 S.Ct.2628; *United States v. Orito,* 93 S.Ct.2674; and *United States v. 12 200-Ft Reels,* 93 S.Ct.2665. Thereafter, on July 6, 1973, as heretofore stated, the Court of Appeal sent its communication to counsel for the respective parties herein, stating that a study of the aforesaid decisions by this Court required a reargument of the case. Following reargument, the opinion of the Court of Appeal was rendered on August 8, 1973 (App. A). In essence, the Court of Appeal held that "there is no constitutional reason why the statute as written cannot continue to be applied pending any changes which the Legislature may wish to make in it" (App. A, p. 7).

The judgment of conviction based upon the commission of an alleged offense in 1970 was upheld under the state obscenity statute which solely embodies the *Memoirs* test, without any specifically defined sexual conduct. In the view of the Court of Appeal, the intent of this Court "was only to require increased specificity

in the state laws if the 'utterly without redeeming social value' test was abandoned" (App. A, p. 13). The Court of Appeal held that this Court did not hold that the "utterly without redeeming social value" test is unconstitutional (App. A, p. 14), stating that insofar as this Court in *Miller* rejected as a constitutional standard the ambiguous concept of social importance, the statement was "only dictum" (App. A, p. 15).

The argument which follows details petitioner's reasons for contending that the opinion of the court below is untenable and unsupportable in the light of this Court's interpretive decisions of June 21, 1973, and the free speech and due process requirements of the Constitution.

As heretofore stated, a petition for hearing by the California Supreme Court was denied on October 24, 1973.

REASONS FOR GRANTING THE WRIT.

1. The provisions of the California obscenity law (Penal Code §§311, 311.2) solely embody the *Memoirs* test. The statute defines "obscene matter", taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to a prurient interest, *i.e.*, a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance. The state legislature "intentionally incorporated as part of the definition itself the important provision that obscene matter 'is matter which is utterly without redeeming social importance', changing the function of these words from a description of a matter of defense to an element of the offense". *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P. 2d 152, 31 Cal.Rptr.800, 812 (1963). See, *Memoirs v. Massachusetts*, 383 U.S. 413.

The state obscenity law does not define for regulation any specific sexual conduct. An attempt to do so by an initiative measure submitted directly to the electors in the November 1972 state election was defeated by more than a two to one vote.[1]

The petitioner herein was tried for an offense allegedly committed on September 19, 1970, and the standards for judging obscenity which were used by the trial judge and jury in the case, resulting in the judgment of

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[1]It was proposed, among other things, to define "nudity, obscenities, sado-masochistic abuse, sexual excitement, and other related terms". A copy of the proposed initiative measure appears in Appendix F hereto. See, particularly, proposed §313.6.

conviction herein, were predicated solely upon the tripartite test as appears in the state obscenity law.

As against the claim that the statute, on its face and as construed and applied to the petitioner, violates the free speech and press and due process provisions of the First and Fourteenth Amendments, the court below has held that the statute and the judgment rendered thereunder are neither in conflict with the provisions of the fundamental law or with the interpretive decisions rendered by the Court on June 21, 1973. The federal question presented is one of substantial importance which has not been, but should be, decided by this Court.

2. In *Miller v. California*, 93 S.Ct.2607, this Court noted that since the decision in *Roth*, no majority of the Court had at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's police power. The Court stated that ". . . we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment" (93 S.Ct. at 2612).

Before enunciating the standards for judging obscenity, the Court unanimously rejected the *Memoirs* test. "The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation." (93 S.Ct. at 2614). The opinion of the Chief Justice noted the observa-

tion by Justice Harlan that "utterly without redeeming social value" did not seem to have "any meaning at all". Moreover, stated the majority opinion: "We do not adopt *as a constitutional standard* the 'utterly without redeeming social value' test of Memoirs v. Massachusetts." Further, it was emphasized, "We also reject, *as a constitutional standard, the ambiguous concept* of 'social importance'." (93 S.Ct. at 2615, n. 6) (Emphasis added). Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct. at 2642, to which the Chief Justice pointed in *Miller*, agreed that the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech", and that none of the differing formulas enunciated by the individual Justices in the past could "reduce the vagueness to a tolerable level" (93 S.Ct. at 2647). As a result of "our failure to define standards with predictable application", the past had been marked by a "lack of fair notice" and a "chill on protected expression" (93 S.Ct. at 2652). And Mr. Justice Douglas added in his dissenting opinion in *Miller:* "The Court has worked hard to define obscenity and concededly has failed." (93 S.Ct. at 2622).

If words have any meaning at all, petitioner submits, with deference, that the only conclusion which can be drawn from the opinion of the Court in the quintet of decisions rendered on June 21, 1973, is that a statute which purports to identify and delimit "obscenity" by a test of "utterly without redeeming social importance" is constitutionally unacceptable. In the view of this Court, the test is unworkable, inoperable, unachievable, vague and ambiguous. It is, in the words of this Court, ambiguous and vague and cannot be accepted "as a constitutional standard".

3. Another prong of the tripartite test of *Memoirs* which this Court found constitutionally infirm was the "national community" standard. This Court described such standard as "unrealistic" and "an exercise in futility". A national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable" and "neither realistic nor constitutionally sound" (93 S.Ct. at 2619, 2620). Thus, the "national standard" test was found to be clearly unconstitutional. Nevtheless, such standard was "correctly regarded at the time of trial as limiting state prosecution under the controlling case law" (93 S.Ct. at 2618).

Unlike the record presented in the case of *Miller v. California,* the petitioner here constantly objected to the use of a state community standard instead of a national community standard, as then required under the interpretive decisions of this Court. Petitioner tendered an instruction to the court on national standards which was rejected, and the trial court instructed only on a state community standard. On appeal, petitioner specifically urged that the state obscenity law, as construed and applied to authorize the judgment of conviction, solely upon the basis of a state standard instead of a national standard, violated the free speech and press and due process provisions of the First and Fourteenth Amendments.

Thus, petitioner was not only tried under the constitutionally vague and ambiguous standard of "utterly without redeeming social importance", but he was also refused a trial under a "national standard of First Amendment protection", correctly regarded at the time of trial "as limiting state prosecution under the controlling case law".

4. As heretofore stated, the state statute under which the judgment of conviction rests does not specifically define any physical sexual conduct allegedly subject to regulation. The statute only proscribes expression. This, again, is a defect of constitutional dimension, as the Court in its decisions of June 21, 1973, made clear.

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed . . . The basic guidelines for the trier of facts must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion . . . Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (93 S.Ct. at 2614-2616).

Since the requirement that a state statute specifically define the sexual conduct the State proposes to regulate was deemed by this Court in *Miller* to be a critical due process requirement in order to satisfy that "precision of regulation" which the First Amendment demands, the absence of such specificity in California Penal Code §§311 and 311.2 is a third ground for invalidating the judgment of conviction herein.

5. In the light of the foregoing, the provisions of the state obscenity law are vague, ambiguous, uncertain and overbroad. The statute, on its face and as construed and applied to the petitioner herein, violates the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of this Court. A trial conducted under statutes which are unascertainable, ambiguous, without clear meaning, incapable of objective measurement, and not limited to specified conduct, is a deprivation of due process in the most primary sense. Standards which are not specifically defined in the law, and which are incapable of objective measurement, fail to provide adequate notice to persons who are engaged in activities which the statute purports to proscribe. In an area where First Amendment rights are implicated, the danger of such lack of meaningful standards is that the statute may sweep within its ambit expression ordinarily entitled to constitutional protection. Such statutes lend themselves to arbitrary and capricious enforcement by law enforcement officers and prosecutors and result in capricious and erratic judgments by courts and juries. *Plummer v. City of Columbus, Ohio,* 94 S.Ct.17; *Gooding v. Wilson,* 405 U.S.518; *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676; *Papachristou v. Jacksonville,* 405 U.S.156; *Ashton v. Kentucky,* 384

U.S.195; *Giaccio v. Pennsylvania,* 382 U.S.399; *Winters v. New York,* 333 U.S.507.

The submission of the issues to the jury in this case, in the light of the absence of constitutionally accepted standards for judging obscenity, amounted to no more than a request for the jurors to assert their own subjective and unguided predilections with respect to the suppression of a motion picture film. The petitioner was deprived of a jury trial in the constitutional sense because the jury was merely licensed to create its own law of the case, its own personal standards. See, *Herndon v. Lowry,* 301 U.S.242.

The trial in the case herein, conducted as it was under the existing statutes, was a denial of due process. The statute does not contain the specific sexual conduct proscribed. The standards which are contained in the statute have been held to be constitutionally infirm. The law therefore did not give fair notice to this petitioner of what was forbidden. Neither the charge nor the proof at the trial ever gave petitioner fair notice that criminal liability was dependent upon violations of specifically defined conduct or standards contained in the statute. See, *Rabe v. Washington,* 405 U.S.313; *Russell v. United States,* 369 U.S.749; *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196.

Even the rudimentary requirements in criminal prosecutions of proof of guilt beyond a reasonable doubt (*In re Winship,* 397 U.S.358) were violated when petitioner in this case was compelled to stand trial under the state obscenity statute which, on its face and as construed and applied, is vague, ambiguous, uncertain and overbroad.

6. The reasons advanced by the court below for sustaining the state obscenity law and the judgment of conviction thereunder are, it is submitted, contrary to the principles enunciated by this Court on June 21, 1973. In essence, the court has held that a state statute which entirely omits the prerequisites of sexual conduct specifically defined by the law, and which retains the tripartite test of *Memoirs* as the sole basis for the suppression of expression and for criminal conviction thereunder, may be deemed valid despite the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court.

It is stated by the court below that the intent of this Court in the June 21, 1973, rulings "was only to require increased specificity in the state laws if the 'utterly without redeeming social value' test was abandoned" (App. A, p. 13). Such a conclusion, it is submitted, plainly misconstrues the essential meaning and significance of the Court's rulings on June 21, 1973. This Court emphasized again and again that if the requirements of due process notice are to be met, the state statute must specifically define the sexual conduct. "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (93 S.Ct. at 2614). *In addition,* this Court held that the basic guidelines for the trier of fact must be appropriate instructions on community standards, patent offensiveness, and lack of serious literary, artistic, political or scientific value.

In unanimously rejecting the *Memoirs* standards for judging obscenity, and in rejecting particularly the

"ambiguous concept" of social importance, this Court gave no indication that the retention of any prong of the former *Memoirs* test would in any way justify omitting from a statute specifically defined sexual conduct. To satisfy First Amendment requirements, this Court promulgated four tests: specifically defined sexual conduct; community standards; patent offensiveness; and lack of serious literary, artistic, political or scientific value. As petitioner understands this Court's decisions, the elimination of any one of these salient features renders a state statute unconstitutionally vague, ambiguous, uncertain and overbroad.

7. In *Miller*, this Court gave examples "of what a state statute could define for regulation" (93 S.Ct. at 2615). The Court also offered laws from Oregon and Hawaii as examples of such precisely defined statutes. It was also stated that specificity in description of sexual conduct might be obtained by authoritative judicial construction.

The court below suggested that previous California cases had limited the state obscenity statute so as to satisfy the *Miller* requirement of specifically defined sexual conduct. The court stated that prior decisions had held that California Penal Code §311 prohibits only "hard-core pornography", "sexual activity", or "graphic description of sexual activity" (App. A, pp. 10-11).

The conclusion of the court below is unsupported in law or in fact. If the state obscenity law has been authoritatively construed by the Supreme Court of California to specifically include the words "hard-core pornography", "sexual activity" and "graphic description of sexual activity", the statute is no less vague, uncertain, ambiguous and overbroad, as the decisions of

this Court in the *Miller* quintet and other decisions of the Court make clear. See, Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S.184, 201; *United States v. Alexander*, 428 F.2d 1169, 1174, fn.7 (8 Cir. 1970).

Moreover, in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr.800, 812-813 (1963), one of the cases referred to by the court below, the California Supreme Court stated: "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance." The construction of the statute in *Zeitlin* was solely an enunciation of the three-part test later embodied in the *Memoirs* ruling of this Court. In the only two California Supreme Court cases cited by the court below, the *Memoirs* test was the sole test adhered to by the courts, and the only question in each of the cases was the application of the test to particular material. Thus, in *Zeitlin*, the book *Tropic of Cancer* was held to be not obscene. In *People v. Noroff*, 67 Cal.2d 791, 433 P.2d 479, 63 Cal.Rptr.575, 576, the court specifically stated that "the only question properly before us is whether the trial court committed error in deciding that INS #5 was constitutionally protected". The court held that the trial court's determination had been correct and that the nudist magazine involved was not obscene.

People v. Cimber, 271 Cal.App.2d Supp.867, 76 Cal. Rptr.382 (1969), a ruling by the Appellate Department of the Superior Court for the County of Los Angeles, merely involved the proper application of a community standard and the requirement of expert evidence. In passing, the court noted that material is not constitutionally protected if it contains a graphic depiction of

sexual activity. No question of an "authoritative construction" of the statute was presented, and the language used by the court is plainly not "specifically defined" sexual conduct. A later decision by the same court stated as follows:

> "To the extent, then, that appellants contend that *Zeitlin* imposes any judicially created modification or limitation upon tests of obscene material prescribed by *Roth* and Penal Code section 311.2 by its references to 'hard-core' pornography, their position is not well taken." *People v. Andrews*, 23 Cal.App.3d Supp.1, 100 Cal.Rptr.276, 278 (1972).

In *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal. Rptr.177 (1966), affirmed 388 U.S.456, the issue of "pandering" was salient to the ruling. The court held that the case met "the criteria recently set forth in *Ginzburg v. United States* . . ." (245 Cal.App.2d at 830). The trial court herein did not purport to "instruct" the jury in terms of *Landau v. Fording*. What did occur here was merely that the prosecution offered as "comparable" evidence the decision of the court in *Landau*, and the trial court took judicial notice of the opinion and read a description of the film from the opinion to the jury [R.T. 846]. In fact, the trial court instructed the jury that the law of the case with respect to the issue of obscenity was precisely as set forth in Penal Code §311, the tripartite *Memoirs* test.

The court below has misconceived the true meaning of this Court's decisions of June 21, 1973. This Court emphasized that the state statute must specifically define the sexual conduct intended to be proscribed. An "authoritative judicial construction" would require a

ruling by the Supreme Court of California, specifically reading into the statute particular sexual conduct as distinguished from expression. This has never been done by the California Supreme Court or, indeed, by any other court in California. The courts have constantly employed solely the three-part test for judging obscenity as they appear in the statute and later embodied in the *Memoirs* test enunciated by this Court. It cannot be seriously contended that the case-by-case adjudication of a state court, applying solely the *Memoirs* test, constitutes due process notice merely because in some cases the particular application of the statute and the *Memoirs* test resulted in holding some material to be constitutionally protected and other material to be obscene. It is undoubtedly for these reasons that the court below felt compelled to hold that specificity in the statute was not required as long as the "utterly without redeeming social importance" test was retained in the law, a position which petitioner has heretofore indicated is entirely inconsistent with the decisions of this Court on June 21, 1973.

Other reasons advanced by the court below appear to be largely makeweight and are equally groundless. The argument that this Court on June 21, 1973, did nothing more than ease the prosecutorial burden in obscenity cases (App. A, p. 12) is not supported by the language of the *Miller* opinion and the other related opinions. Petitioner does not construe the June 21, 1973, decisions as intending a mere act of lawmaking by this Court. If all that was intended by the Court was to create different requirements for an obscenity prosecution than had heretofore existed, the Court would have undoubtedly left the matter for appropriate action by Congress. See, *United States v. Robel*, 389

U.S.258, 267. As petitioner understands this Court's rulings of June 21, 1973, the prior requirements for judging obscenity were *constitutionally deficient:* first, because of the lack of specificity in statutes with respect to the physical sexual conduct proscribed; and, second, because the tests embodied in *Memoirs* were unworkable, ambiguous, hypothetical, unprovable, and generally incapable of objective measurement. The issue cannot be resolved, as the court did below, by merely asserting that an accused in an obscenity prosecution was "better off" before June 21, 1973, than he will be after that date. In actuality, prosecutor, accused, and particularly the public generally, suffered under vague, ambiguous, uncertain and overbroad standards for judging obscenity, and the mere retention of the same unconstitutional standards after the rulings of this Court in *Miller* and the related decisions cannot, under such circumstances, be supported.

Nor does the opinion of the court below find support in the notion that the statute herein involved is "not unconstitutional" (App. A, p. 7) because this Court in *Miller* and the related rulings vacated instead of reversing the state court judgments and in remanding for further proceedings not inconsistent with the First Amendment standards (App. A, p. 8). If it is logical to assume that the statute here is not unconstitutional merely because this Court failed to reverse the judgments, it is equally logical to assume that the statute is unconstitutional because this Court failed to affirm. The fact is that remanding was made necessary by the inherent character of the Court's decisions. The Court held that the state courts must now confront the problems of whether or not the state statutes specifically define sexual conduct; whether judicial legislation or legislative

action is required; and whether, if the new standards promulgated by *Miller* for judging obscenity are read into the existing statutes, such new standards can be applied retroactivity to activities which took place at a time when the *Memoirs* standards were the only standards for judging obscenity. See, *Bouie v. Columbia,* 378 U.S. 347; *Douglas v. Bruder,* 93 S.Ct.2199.

8. The petitioner introduced expert testimony at the trial on his behalf. The trial court instructed the jury, in effect, that evidence of community standards is unnecessary and such testimony need not be considered if the jury found the material in question so patently offensive as to violate any conceivable community standard (App. A, pp. 16-17). The court below held that the aforesaid instruction given by the trial judge to the jury was proper. On this issue there had been a dissent by one of the judges of the Appellate Department of the Superior Court (App. B, pp. 31-33).

In *Kaplan v. California,* 93 S.Ct.2680, 2685, this Court stated: "The defense should be free to introduce appropriate expert testimony", citing the concurring opinion of Justice Frankfurter in *Smith v. California,* 361 U.S.147. Plainly, the denial by a trial court of all opportunity to prove by competent evidence that a film is not obscene violates the free speech and press and due process provisions of the First and Fourteenth Amendments. The rule that deprivation of the right to present evidence bearing on the issues in a case is a denial of due process has been an enduring principle. See, *Saunders v. Shaw,* 244 U.S.317, 319; *Chin Yow v.*

United States, 208 U.S.8, 11-13; *Morgan v. United States,* 298 U.S.468, 480-481.

The case herein was tried under a theory that the community standard was the state standard. It should have been tried under the theory that the measure of constitutional protection afforded the film was a national community standard. When, however, a jury is instructed that they may resort to "any conceivable community standard", then they are in effect being told that the expert evidence offered by an accused, no matter how competent and no matter how uncontradicted, may be totally disregarded and each member of the jury left free to create his own standard of patent offensiveness. There would appear to be no point, it is submitted, for an instruction to a jury, either upon a national standard or a state standard, if after the presentation of evidence with respect to either standard, a jury of twelve is left to create separate standards without regard to the evidence in the case. A due process trial "must be a real one, not a sham or a pretense". *Palko v. Connecticut,* 302 U.S.319, 327.

9. The state statute, as construed and applied to the motion picture film herein involved, violates the free speech and press and due process provisions of the First and Fourteenth Amendments. In the constitutional sense, the film, which depicts simulated sexual activities between males, is not obscene. The alleged offense of exhibiting this film occurred on September 19, 1970. Comparable material was subsequently held to be constitutionally protected. See, *Wiener v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment of the Court of Appeal.

The People of the State of California, Plaintiff and Respondent, v. Werner Ernest Enskat, Defendant and Appellant. Cr. No. 22506.

Court of Appeal, Second District, Division 5. Aug. 8, 1973.

Roger Arnebergh and Burt Pines, City Attys., David M. Schachter, Deputy City Atty., for plaintiff and respondent.

Fleishman, McDaniel, Brown & Weston by David M. Brown, Hollywood, for defendant and appellant.

Joseph P. Busch, Dist. Atty., Harry B. Sondheim and Dirk L. Hudson, Deputy Dist. Attys. for amicus curiae.

Cole, Associate Justice.*

This is a pornography case, here on certification by the Appellate Department of the Superior Court of Los Angeles County on its own motion. When we accepted the case and ordered it transferred here, we did so primarily to decide whether the Municipal Court erred in instructing the jury that it could disregard expert testimony of community standards if it found that the conduct in question was so patently offensive as to violate any conceivable community standard.

That question and other issues previously presented in the appeal have now been overshadowed by a new contention that Penal Code Sections 311 and 311.2

*Assigned by the Chairman of the Judicial Council.

are unenforceable[1] as a result of decisions of the United States Supreme Court handed down on June 21, 1973.[2] We proceed now to discuss that contention and deal subsequently in this opinion with the earlier raised issues.

Appellant Werner Enskat was convicted by a Municipal Court jury of violating Penal Code Section 311.2.

The conviction arose from his exhibition of what was alleged to be an obscene sound motion picture entitled "The Collection".[3] The applicable part of section 311.2 provides, ". . . Every person who . . . possesses . . . with intent to . . . exhibit to others or who . . . exhibits to others, any obscene matter, is guilty of a misdemeanor . . ." Section 311 provides, so far as relevant here, ". . . 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity,

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[1]All statutory references are to the Penal Code.

[2]These opinions are Miller v. Calif., ... U.S. ...., 93 S.Ct. 2607, 37 L.Ed.2d 419 (hereinafter Miller); Paris Adult Theatre I v. Slaton, ... U.S. .... 93 S.Ct. 2628, 37 L.Ed.2d 446 (hereinafter Paris); United States v. Orito, ... U.S. ...., 93 S.Ct. 2674, 37 L.Ed.2d 513 (hereinafter Orito); Kaplan v. Calif., ... U.S. ...., 93 S.Ct. 2680, 37 L.Ed.2d 492 (hereinafter Kaplan); and United States v. 12 200-Ft. Reels of Super 8mm. Film, ... U.S. ...., 93 S.Ct. 2665, 37 L.Ed.2d 500 (hereinafter 12 200-Ft. Reels). The federal Supreme Court on June 25, 1973 also decided three other cases in the field of obscenity: Heller v. New York, ... U.S. ...., 93 S.Ct. 2789, 37 L.Ed.2d 745 (hereinafter Heller); Roaden v. Kentucky, ... U.S. ...., 93 S.Ct. 2796, 37 L.Ed.2d 757 (hereinafter Roaden); and Alexander v. Virginia, ... U.S. ...., 93 S.Ct. 2803, 37 L.Ed.2d 993 (hereinafter Alexander).

[3]On a prior trial a conviction was reversed by the Appellate Department on the ground that the prosecution had not complied with the best evidence rule (People v. Enskat, 20 Cal.App.3d Supp. 1, 98 Cal.Rptr. 646).

sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance . . ." This statutory definition derives from the language of the United States Supreme Court in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498, as amplied in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1. The extreme difficulty in defining obscenity and in applying the definition to particular fact situations and "the somewhat tortured history of the [United States Supreme] Court's obscenity definitions" (*Miller*, ... U.S. at ...., 93 S.Ct. at 2612) need not be recounted here. It is amply discussed in *Miller* (.... U.S. at ...., 93 S.Ct. 2607); and in the dissent of Brennan, J., in *Paris* (.... U.S. at ...., 93 S.Ct. 2628 et seq.).

Does California still have an Obscenity Statute?

Miller marks a new turn in obscenity prosecutions. Since it and its companion decisions were handed down, they have been popularly regarded as making it easier for convictions to be secured in obscenity cases. That is so because no member of the United States Supreme Court any longer supports the *Memoirs* definition of obscenity (*Miller, supra,* ..... U.S. at ....., 93 S.Ct. 2607) and in particular, because that part of the definition which required obscene matter taken as a whole to be "utterly without redeeming social importance" has been abandoned. In its place the Court has adopted a different standard: "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value". (*Miller,* ..... U.S. at ....., 93 S.Ct. at 2615)

We turn then to a discussion of the problem posed to us by *Miller*. Appellant argues vigorously that the Supreme Court's abandonment of the *Memoirs'* test, upon which the definition of obscene matter in section 311 is based, renders that statute and its application to appellant's case unenforceable. This argument requires us to examine closely into the Supreme Court's holding in *Miller*. That case, as the one at bench, involved sections 311 and 311.2. Specifically at issue in *Miller* were five unsolicited advertising brochures primarily consisting "of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed" (*Miller*, ... U.S. ...., 93 S.Ct. at 2611). After pointing out that it has been "categorically settled" that obscene matter is unprotected by the First Amendment, the Court stated that it acknowledged, however, ". . . the inherent dangers of undertaking to regulate any form of expression . . ." (*Miller*, ... U.S. at ...., 93 S.Ct. at 2614). Accordingly, the Court continued ". . . State statutes designed to regulate obscene materials must be carefully limited. [Citation omitted] As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. [Footnote omitted] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. Kois v. Wisconsin . . . 408 U.S. [229] at 230, 92 S.Ct. [2245] at 2246, 33 L.Ed.2d 312 (1972), quoting Roth v. United States, *supra*, 354 U.S. at 489, 77 S.Ct. at 1311, [1 L.Ed.2d 1498] (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs* . . ." (emphasis by the Supreme Court, *Miller*, ... U.S. ....., 93 S.Ct. at 2614-2615). The Court additionally declared that "We also reject, as a constitutional standard, the ambiguous concept of 'social importance.'" (Id. at ....., 93 S.Ct. at 2615).

Finally, the Court said,

". . . We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, *supra*:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals."

Building on *Miller's* holding that the permissible scope of state statutes regulating obscene material is confined to works depicting or describing sexual conduct *specifically defined* by the applicable state law as written or authoritatively construed, appellant now argues that sections 311 and 311.2 are facially vague and overbroad because they fail to specifically define proscribed depictions or representations of sexual conduct. He further argues that California appellate courts have not had the occasion to authoritatively construe those sections so as to limit their reach to specifically defined sexual conduct. Also, appellant asserts, the statutory element that the work be "utterly without redeeming social importance" has been rejected by the Supreme Court as impermissible. The upshot of the argument is appellant's contention that he has been denied due process and that his case was submitted to the jury "in the absence of viable legal standards". He urges that "the new and prospective standards" enunciated in *Miller* cannot be applied to this case. Relying on Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, he argues that if a statute is vague, the vice inherent in that vagueness cannot be cured in the very case under consideration by placing valid limits on the statute. His claim is that this would amount to a retrospective application comparable to *ex post facto* legislation. Finally, appellant states that separation of powers principles would be violated were this court to judicially rewrite the statutes.

We summarize our holdings as follows:

(1) The United States Supreme Court has not held section 311 and like state statutes unconstitutional but

rather has left it to the states to see if their statutes measure up to the *Miller* requirements.

(2) Except for the requirement that obscene matter be "utterly without redeeming social importance", section 311 has been previously construed substantially in accordance with the *Miller* requirements and the jury was so instructed.

(3) The courts are not at liberty to read out of section 311 the "utterly without redeeming social importance" element of the offense proscribed by that section; that is a matter for the Legislature. However, there is no constitutional reason why the statute as written cannot continue to be applied pending any changes which the Legislature may wish to make in it.

We discuss briefly these propositions.

First, in *Miller,* the Supreme Court made it clear that section 311 and like statutes were not unconstitutional.[4] Additionally, in Kaplan, *supra,* ..... U.S. ..... at ....., 93 S.Ct. 2680, 37 L.Ed.2d 492, the Court held that a book involved there was obscene and not protected by the First Amendment and that ". . . the prosecution's evidence was sufficient, as a matter of federal constitutional law, to support petitioner's conviction . . ." Like *Miller, Kaplan* also involved sections 311 and 311.2.

Orders issued by the United States Supreme Court in disposing of the obscenity cases before it illuminate

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[4]See *Miller* footnote 6, ... U.S. ...., 93 S.Ct. 2615: ". . . We do not hold, as Mr. Justice BRENNAN intimates, that all States other than Oregon must now enact new obscenity stautes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12-200 Ft. Reels Film, ... U.S. ...., p. ...., n. 7, 93 S.Ct. 2665, p. 2670, n. 7, 37 L.Ed.2d 500 (1973)."

that Court's conclusion that it is possible for a statute either to be limited on remand by judicial construction, or to be held on remand to have been previously so limited. In *Miller*, the order of Court was to *vacate*, not reverse, the state court judgment and to remand the case to the Appellate Department of the Superior Court of Orange County, whence it had come, "for further proceedings not inconsistent with the First Amendment standards established by this opinion". (..... U.S. ...., at ...., 93 S.Ct. at 2622) Footnote 7 of 12 200-Ft. Reels was cited. With one exception, a similar disposition was made in all of the other state obscenity cases decided by the Court together with *Miller*.[5]

To be contrasted is the disposition of the obscenity cases in *12 200-Ft. Reels*. There, the material had been seized at a port of entry under a federal statute prohibiting importation of "obscene or immoral" matter. The federal trial court held the statute under which the seizure resulted unconstitutional on its face. Reversing that decision, the United States Supreme Court returned the case to the trial court to determine whether the material involved was obscene in the light of

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[5]Thus, in *Paris, supra*, ... U.S. .... at ...., 93 S.Ct. 2628, 37 L.Ed.2d 446, the Court held that the state of Georgia could regulate the allegedly obscene materials involved and provided that the applicable Georgia law as written or authoritatively interpreted by Georgia courts met the *Miller* requirements. Judgment was vacated and the case was remanded to the Georgia Supreme Court for proceedings not inconsistent with *Miller*. Again, *12 200-Ft. Reels* was cited. Similar dispositions were made in *Kaplan* .... U.S. at ...., 93 S.Ct. 2680; *Heller* .... U.S. at ...., 93 S.Ct. 2789, and *Alexander* .... U.S. at .... 93 S.Ct. 2803. The only state case where a reversal resulted was *Roaden*, ... U.S. .... at ...., 93 S.Ct. 2796, 37 L.Ed.2d 757, and such a disposition was necessitated by the Court's holding that the material there involved had been improperly seized in violation of the Fourth and Fourteenth Amendments.

Miller.[6] The Court then noted in footnote 7, ... U.S. at ...., 93 S.Ct. 2680, that while the construction of state legislation should be left to state courts, the Supreme Court had a duty to authoritatively construe federal statutes where a serious doubt of constitutionality is raised and continued, ". . . If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, see United States v. Orito, *supra*, . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descripions of that specific 'hard-core' sexual conduct given as examples in Miller v. California, *supra* . . ."

Second, we need not discuss further the first element of section 311—that obscene matter is matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards is to prurient interest. It is identical with one of the three *Miller* requirements. And, since we hold that section 311 is to be applied in appellant's case as it has previously been construed, (and without eliminating the statutory requirement that an obscene work is one "utterly without redeeming social importance") we pause but briefly with appellant's contention that section 311 has not been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct.[7] The contention is incorrect.

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[6]A similar result was reached in Orito.

[7]Because of this holding, it is unnecessary to consider further appellant's argument that a statute cannot be given a limiting interpretation in the very case under consideration.

In requiring that obscene matter must go "substantially beyond contemporary limits of candor in description or representation of such matters", the statute is substantially the same as the general *Miller* formulation which inquires "whether the work depicts or describes, in a patently offensive way, sexual conduct". *Miller* states that those matters must be "specifically defined by the applicable state law". Previously California cases have so limited section 311. Thus, it is clear that section 311 prohibits only "hard-core pornography" (Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152)[8], that nudity does not equate with obscenity and that "no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene" (People v. Noroff, 67 Cal.2d 791 at 797, 63 Cal.Rptr. 575 at 579, 433 P.2d 479 at 483), and that "To constitute obscenity . . . the material must contain a graphic descrip-

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[8]In *Miller*, the Court said, "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed . . ." (*Miller*, ... U.S. at ...., 93 S.Ct. at 2616).

Zeitlin states (59 Cal.2d at page 904, 31 Cal.Rptr. at page 802, 383 P.2d at page 154): ". . . we believe the Penal Code section [311] constitutionally may exorcise only hard-core pornography, and . . . the statute does no more . . .";

(at pages 911-912, 31 Cal.Rptr. at page 807, 383 P.2d at page 159): ". . . [Roth v. United States, *supra*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498] impliedly drew a line of constitutional protection around all material except that which has been described as hard-core pornography . . .";

(at pages 918-919, 31 Cal.Rptr. at page 811, 383 P.2d at page 163): ". . . Cognizant of these constitutional guarantees, the Legislature wrote a statute which, in substance, prohibited hard-core pornography; [a footnote which we omit admits that defining hard-core pornography can be difficult] the draftsmen recognized that a wider proscription would trespass upon an area which is constitutionally protected . . ."

tion of sexual activity" (People v. Cimber, 271 Cal. App.2d Supp. 867, 869, 76 Cal.Rptr. 382, 383). Further, and with respect to material of similar character to that involved here[9], Landau v. Fording, 245 Cal. App.2d 820, 54 Cal.Rptr. 177 stated with reference to a film depicting, among other things, fellatio, sodomy and oral copulation that "It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships . . ." (245 C.A.2d at 826, 54 Cal.Rptr. at 181)[10]. The film was held to be obscene with the meaning of section 311. *Miller* thus has not imposed any new requirements upon California law insofar as

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[9]We have viewed the film involved here—"The Collection"—as we are constitutionally compelled to do. We have no hesitation in sustaining the jurors' verdict after making our independent examination of the whole record (*Zeitlin* at page 909, 31 Cal. Rptr. 800, 383 P.2d 152; *Miller* .... U.S. at ...., 93 S.Ct. 2607). The film graphically depicts homosexual activities of four males.

[10]The jury in the instant case was informed by adequate instructions of the elements of section 311 dealing with prurient interest and depictions or representations going substantially beyond contemporary limits of candor. The jury was further instructed as follows: "You are instructed that nudity and obscenity are not synonymous. The display, live or pictorial, of the nude human body, male or female, or both, in the absence of depicting any sexual activity is not legally obscene. Sex and obscenity are not synonymous. The description or portrayal of sexual activity which does not appeal to prurient interest is not legally obscene. On the other hand, the graphic portrayal or description of sexual activities, predominant appeal which is to the prurient interest is legally obscene provided the other two elements of obscenity, as previously defined to you in these instructions, have been met." Further, at the request of the prosecution and over initial defense objection (the objection was withdrawn at oral argument before the Appellate Department), the Municipal Court took judicial notice of Landau v. Fording, *supra*, and read to the jury the portion of the opinion therein describing the sexual activities depicted, together with the statement from that case that the film there involved went far beyond customary limits of candor.

two of the three elements required by section 311 are involved.

Third, Miller has however, eased the prosecutorial burden in obscenity cases by not adopting as a constitutional reuquirement the "utterly without redeeming social value" test and the concept of "social importance" discussed in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (reported sub nom. A Book v. Attorney General, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1). Section 311 includes that test: ". . . 'Obscene matter' . . . is matter which taken as a whole is utterly without redeeming social importance". This language constitutes one element of the definition of obscenity established by the Legislature.

The California Supreme Court has recently said the following: "In California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal. [Citations omitted.] *Deletion by the courts of one of the statutory requirements of a crime would make conduct criminal which the Legislature has not seen fit to make criminal* and would violate the fundamental principle that there are no common law crimes in this state . . ." (In re Bozorg, 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 472, 510 P.2d 1017, 1024, emphasis supplied.) See also In re James M., 9 Cal.3d 517, 108 Cal.Rptr. 89, 510 P.2d 33. This court, thus, may not read out of section 311 the "utterly without redeeming social importance" requirement. To do so "would be to invade the province of the Legislature by redefining the elements of the underlying crime" (In re James M., *supra,* at 522, 108 Cal.Rptr. at 92, 510 P.2d at 36) and would thus violate separation of powers principles.

Only two alternatives appear to remain to us: To declare, as appellant would have us do, that in light of *Miller*, California no longer has an obscenity statute or, to hold, as we believe *Miller* and its companions clearly indicate should be the result, that the retention of the "utterly without redeeming social importance" requirement, pending any legislative change in section 311, is not constitutionally fatal. We choose the latter course and proceed to examine the reasons for this conclusion.

In the first place, by adopting a test that matter can be found to be obscene if it merely "lacks *serious* literary, artistic, political, or scientific value" (*Miller* .... U.S. at ...., 93 S.Ct. at 2615, emphasis supplied), instead of being utterly without redeeming social value, the Supreme Court has obviously made it considerably easier for obscenity prosecutions to succeed. With such a relaxation of the prosecutor's burden goes a corresponding increase in "the inherent dangers of undertaking to regulate any form of expression" (*Miller* at ...., 93 S.Ct. at 2614).

These dangers were expressly recognized by the Supreme Court in *Miller*. It is because of them that the Court enunciated the new statutory standards which we have discussed at length. It would be most anomalous if the result of the relaxed requirements put on the prosecution by *Miller* and its companion decisions was the elimination of California obscenity laws pending any legislative reenactment.

In the second place, language in *Miller* itself indicates that the intent of the Court was only to require increased specificity in the state laws if the "utterly without redeeming social value" test was abandoned.

Thus, in summing up its holding, the Supreme Court said, among other things, that ". . . [W]e . . . hold that [obscene] material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is '*utterly* without redeeming social value', . . ." (*Miller* at ...., 93 S.Ct. at 2622, emphasis by the United States Supreme Court). The Supreme Court nowhere holds that the "utterly without redeeming social value" test is itself unconstitutional The precise language used by the Court is set forth in the margin.[11]

In the third place, there is no reason at all why state law cannot impose more strict requirements on the prosecution as to the definitions of obscenity than the constitution would require. That, in effect, is what the "utterly without redeeming social importance" formulation does. In *Paris, supra,* .... U.S. ...., at ...., 93 S. Ct. 2628 at 2633, 37 L.Ed. 2d 446 the Court pointed out that "It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material . . ." Clearly, the states can adopt or retain more restrictive standards for obscenity prosecutions.

Appellant argues that because the Supreme Court has characterized the words, "social importance" as ambiguous, no viable standard remains.

It is clear to us that the focus of the Court's decision was not on the ambiguity of "social importance", but

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[11]"We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs* . . ."
"We also reject, as a constitutional standard, the ambiguous concept of 'social importance' . . ." (*Miller* .... U.S. at ...., 93 S.Ct. 2615, n. 7, emphasis by the United States Supreme Court).

rather on the change from works which are *utterly* without value or importance to works which *lack serious* value or importance. The Court expressly has retained the concept of "value" as part of the test for obscenity permitted under *Miller*. Yet, the phrases, "social value" and "social importance" not only have been used interchangeably in Supreme Court decisions, but are synonymous.[12] Thus, though the concept of "social importance" was referred to by the Supreme Court in *Miller* as being ambiguous, its semantic equivalent is set forth as a standard without constitutional defect. Further, the passing reference to ambiguity in *Miller* is only dictum. In light of all the circumstances, it is clear that this court would be remiss in seizing on that reference to invalidate California's obscenity laws.

Additionally, if a claim is made that retention of section 311's requirement that a work be "utterly without redeeming social importance" renders the statute fatally vague, we think the answer is that it is no more vague than the phrases upheld against such challenge in the *Giannini* decision ("lewdly" and "lewd or dissolute" In re Giannini, *supra*, 69 Cal.2d 563, 571, 72 Cal.Rptr. 655, 466 P.2d 535) or in the phrases treated in foot-

[12]Compare the lead opinion in Memoirs v. Massachusetts, *supra*, 383 U.S. 413, 418, 86 S.Ct. 975, 978, 16 L.Ed.2d 1, written by Brennan, J., "The material is utterly without redeeming social *value*" with Justice Brennan's subsequent opinion in Jacobellis v. Ohio, 378 U.S. 184, 191, 84 S.Ct. 1676, 12 L.Ed.2d 793, 800, 86 S.Ct. 975 "utterly without redeeming social *importance*" and with Justice Douglas' dissent in *Memoirs*, 383 U.S. at 426, "utterly without redeeming social *importance*". (emphasis ours. The words, "value" and "importance", or their derivates, also are synonymous. One of the definitions of value (Webster's New International Dictionary, Second Edition 2814) is, "relative worth, importance or utility". "Importance" is defined, Webster's, *supra*, 1250, as the "quality or state of being important" and "important" in turn, is defined *inter alia*, as "of valuable content or bearing".

note 7 of *12 200-Ft. Reels, supra,* ("lewd", "lascivious", "filthy", "indecent", "immoral", ... U.S. at ...., 93 S.Ct. 2665) or for that matter, than the predecessor language of section 311 upheld against an attack of vagueness in Alberts v. California, decided in the same opinion as Roth v. United States 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.[13]

In sum, as to the issues raised by Miller v. California and its companion decisions, we hold (1) that section 311 as heretofore construed, defines obscene matter as required by *Miller,* except as to *Miller's* tolerance of an obscenity finding as to matter which is not utterly without redeeming social importance; (2) that while the work in question here meets the *Miller* test of lacking serious literary, artistic and other values, we cannot apply that yardstick to it, but instead must measure it against the concept of being "utterly without redeeming social importance"; (3) that such measurement is still permissible; and (4) that so measured, the film which appellant was convicted of exhibiting is obscene.

Need for Expert Testimony

We now arrive at the questions originally certified by the Appellate Department. They are as follows:

"1. Is expert testimony or other evidence of contemporary community standards necessary to convict under Penal Code section 311.2 in all cases?

"2. Where a defendant has introduced expert testimony on the subject of community standards, may the jury be instructed that evidence of community

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[13]At the time of the decision in *Alberts,* section 311, among other things, prohibited a person from "lewdly keeping for sale obscene and indecent books", 354 U.S. 476, 481, 77 S.Ct. 1304, 1307, 1 L.Ed.2d 1498, 1505.

> standards is unnecessary and such testimony need not be considered if it finds the material in question is so patently offensive as to violate any conceivable community standard?"

Expert testimony was given by witnesses for both sides as to whether the material was obscene. Over defense objection, the court gave the following instruction at the request of the People: "You are instructed that should you first find that the conduct in question, from all the evidence and beyond a reasonable doubt, is so patently offensive as to violate any conceivable community standard, evidence of community standards is unnecessary; and expert testimony need not be considered upon this issue."[14] It is this instruction which is attacked by appellant. We hold the instruction to be proper.

The requirement that expert testimony must be introduced in obscenity cases on the issue of community standards was introduced in In re Giannini, *supra*, [1968], 69 Cal.2d 563, 574, 72 Cal.Rptr. 655, 466 P.2d 535. Holding that the relevant community to be considered in determining whether a challenged dance violated "contemporary standards" was a statewide one, the court refused to assume that jurors in themselves necessarily reflected those standards. Therefore, expert testimony was required. The court had under considera-

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[14]As a matter of language the instruction, taken most literally, is meaningless since it tells the jury that expert testimony need not be considered only if the jury first finds "from all the evidence" that the material is patently offensive. "All the evidence" includes the very expert testimony at issue. However, the parties and the Appellate Department each treated the case as raising the questions certified to us. The jury also was instructed pursuant to the provisions of section 1127b that it might disregard any expert opinion found to be unreasonable. Under these circumstances, we proceed to decide the certified questions.

tion, however, a "topless" dance shown only to adults and stated as to it "Since this conduct is not so patently offensive as to violate any conceivable community standard, we need not decide whether evidence of community standards must be introduced in an extreme and unquestionable situation." (69 Cal.2d at 576, fn. 8, 72 Cal.Rptr. at 664, 466 P.2d at 544.) Thus, *Giannini* itself, upon which appellant relies does not require that expert testimony be presented in the situation envisaged by the instruction challenged here. Further, section 312.1[15] was adopted by the Legislature after the *Giannini* decision. The section in effect repeals *Giannini* (see In re Price, 4 Cal.App.3d 941, 948, 84 Cal.Rptr. 585 [Thompson, J., dissenting]).

In *Paris, supra,* .... U.S. ...., 93 S.Ct. 2628, 37 L. Ed.2d 446, the United States Supreme Court held that it was not error "to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . ." (.... U.S. at ...., 93 S.Ct. at 2634). The court stated that the films there involved were obviously the best evidence of what they represent and that in its decisions since Roth v. United States, *supra,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 it had regarded the ma-

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[15]§ 312.1 "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense." (The words "or live conduct" were added to the section in 1970.) [Stats.1969, ch. 925 sec. 1; amended by Stats.1970, ch. 1072 sec. 3].

terials as sufficient in themselves for the determination of the question. Finally, the United States Supreme Court said, "This is not a subject that leads itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. Wigmore on Evidence (3d ed.). §§ 556, 559. No such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony . . . 'Simply stated hard core pornography . . . can and does speak for itself.' United States v. Wild, *supra,* 422 F.2d [34] at 36 (CA2 1970), cert. denied, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See Mishkin v. New York, 383 U.S. 502, 508-510, 86 S.Ct. 958, 963-964, 16 L.Ed.2d 535 (1966); United States v. Klaw, 350 F.2d 155, 167-168 (CA2 1965)." (*Paris,* at .... U.S. ...., 93 S.Ct. 2634, footnote 6.)

As for the argument that the instruction deprived appellant of the benefit of the testimony of his defense experts, we see no difference in substance between the manner in which the jury was instructed and the provisions of section 1127b. The defense is free to introduce expert testimony (*Kaplan* at .... U.S. ...., 93 S. Ct. 2680), but the jury may disregard it if they find it to be unreasonable. We therefore hold that on the facts of this case, the giving of the instruction was not

error and that expert testimony was not necessary to convict appellant.

Miscellaneous Issues

Other contentions raised by appellant in the Appellate Department or before us have also been laid to rest by *Paris* and its judicial siblings, and need not be discussed by us. Remaining for consideration is the contention that the film in question was seized under an improper search warrant, a claim that the jury was improperly instructed as to scienter and that there was insufficient evidence that appellant knew the film was obscene and a claim that the court misdefined certain terms in its instructions. As to the scienter instruction, we see nothing wrong with it; the jury was adequately instructed that the People had to prove that appellant was aware of the character of the matter; we know of no requirement that it must be proven that appellant knew the film was obscene separately from the jury's ultimate determination that that is the fact. We decline to search the record to see if the evidence of appellant's knowledge was sufficient. It is appellant's burden to point out all evidence on the issue and he does not purport to do so.

Appellant's contention that the court did not properly define terms in its instructions is not well taken.

Insofar as appellant argued to the Appellate Department that the copy of the film introduced into evidence as Exhibit 1 should have been suppressed, we agree with the decision of the Appellate Department on that point and adopt it as our own as follows:

"Appellant contends that Exhibit One, a copy of the film, was seized under a warrant, the affidavit for which did not sufficiently show an intent of the posses-

sor of the film to commit a public offense with it (i.e., an intent to distribute or exhibit the film in violation of Penal Code section 311.2) as is required by Penal Code section 1524(3).

"2. 'A search warrant may be issued upon any of the following grounds: . . . 3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.'

"Such warrant authorized the search of premises of one Thomas DeSimone. In surveying this contention we shall assume in appellant's favor, the resolution of the question whether the asserted deficiency in an application to search the premises of a nondefendant can be raised by appellant."

"We do not agree with the contention. This film is sufficiently identified in the affidavit, by its title, as a 16 mm. color film. Moreover, a summary of its contents was given by incorporating in the affidavit the description in the application for a criminal complaint against appellant. The location, 8965 Keith Avenue, Los Angeles, is sufficiently described as a single family residence of wood and stucco with, among others, a louvered door through which could be seen a 'film studio'. Contained within the studio, numerous film cans and some filming equipment could be seen through the door. One film can bearing the name 'The Collection' and one bearing the name 'The Collection-Print 2' could also clearly be seen. The affidavit further al-

leged that affiant, while on duty investigating obscenity cases had, on September 19, 1970, observed the film publicly exhibited at the Avon Theater, 7059 Hollywood Boulevard, Los Angeles, where it had been shown for about a week. Facts were also alleged showing that the Avon Theater obtained the film from Signature Films Company, which leased it from Thomas DeSimone. The affidavit showed that the resident at that address was Thomas DeSimone and that affiant had seen DeSimone's name on the film when viewing it at the Avon Theater as the director and co-producer thereof.

"From these facts the magistrate could fairly infer that the copy of the film seized under the warrant was possessed by DeSimone with the intent to commit a public offense (i.e., to distribute or exhibit the film). There was no error in admitting it in evidence."

The judgment of conviction is affirmed.

KAUS, P. J., and STEPHENS, J., concur.

APPENDIX B.

Opinion and Certification Order, Appellate Department.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Werner Ernest Enskat, Defendant and Appellant. Superior Court No. CR A 11202, Municipal Court of the Los Angeles Judicial District No. 368363.

Filed: Oct. 12, 1972.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, Mary E. Waters, Judge.

Judgment affirmed.

For Appellant—Stanley Fleishman, Inc. by David M. Brown; For Respondent—Roger Arnebergh, City Attorney by Ward G. McConnell.

Appellant was convicted by a jury of a violation of Penal Code section 311.2, the allegedly obscene exhibition of a sound color film called "The Collection."[1]

1. Appellant contends that Exhibit One, a copy of the film, was seized under a warrant, the affidavit for which did not sufficiently show an intent of the possessor of the film to commit a public offense with it (i.e., an intent to distribute or exhibit the film in viola-

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[1]On a prior trial a conviction was reversed by this court on the ground that the prosecution had not complied with the Best Evidence Rule. (*People v. Enskat* [1971] 20 Cal.App.3d Supp.1 [98 Cal.Rptr. 646].)

tion of Penal Code section 311.2) as is required by Penal Code section 1524(3).[3]

We do not agree with the contention. This film is sufficiently identified in the affidavit, by its title, as a 16 mm. color film. Moreover, a summary of its contents was given by incorporating in the affidavit the description in the application for a criminal complaint against appellant. The location, 8965 Keith Avenue, Los Angeles, is sufficiently described as a single family residence of wood and stucco with, among others, a louvered door through which could be seen a "film studio." Contained within the studio, numerous film cans and some filming equipment could be seen through the door. One film can bearing the name "The Collection" and one bearing the name "The Collection—Print 2" could also clearly be seen. The affidavit further alleged that affiant, while on duty investigating obscenity cases, had, on September 19, 1970, observed the film publicly exhibited at the Avon Theater, 7059 Hollywood Boulevard, Los Angeles, where it had been shown for about a week. Facts were also alleged showing that the Avon Theater obtained the film from Signature Films Company, which leased it from Thomas DeSimone. The affidavit showed that the resident at that address was Thomas DeSimone and that

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[3]"A search warrant may be issued upon any of the following grounds: . . . 3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered."

Such warrant authorized the search of premises of one Thomas DeSimone. In surveying this contention we shall assume in appellant's favor, the resolution of the question whether the asserted deficiency in an application to search the premises of a nondefendant can be raised by appellant.

affiant had seen DeSimone's name on the film when viewing it at the Avon Theater as the director and co-producer thereof.

From these facts the magistrate could fairly infer that the copy of the film seized under the warrant was possessed by DeSimone with the intent to commit a public offense (i.e., to distribute or exhibit the film). There was no error in admitting it in evidence.

2. The other contention challenges a jury instruction. "The Collection" was viewed by the jury during the trial from beginning to end. Experts for both sides gave conflicting opinions as to whether the material was obscene under Penal Code section 311. The court took judicial notice of certain judicial decisions in the obscenity field,[3] and copies of a brochure advertising, with pictures, a "marriage manual" were received in evidence. Pursuant to request of the People (and over objection) the court instructed the jury (No. 11):

> "You are instructed that should you first find that the conduct in question from all the evidence and beyond a reasonable doubt is so patently offensive as to violate any conceivable community standard, evidence of community standard [sic] is unnecessary and expert testimony need not be considered upon this issue."

It is first noted that this asserted error has a double aspect: It allows the jury to find a violation in disregard of the expert testimony of the prosecution as well as that of the defense.

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[3]Appellant's contention that the taking of judicial notice of *Landau v. Fording* [1966] 245 Cal.App.2d 820 [54 Cal.Rptr. 177] was error was withdrawn in argument.

A. *May a jury hold material obscene without the benefit of expert testimony as to community standards?*

In jurisdictions other than California the law is that a jury may do so. The United States Supreme Court has acknowledged that it has considered the materials themselves sufficient for the determination of the question of obscenity. (*Ginzburg v. United States* [1966] 383 U.S. 463, 465 [86 S.Ct. 942, 944, 16 L.Ed.2d 31, 35, reh.den. 384 U.S. 934, 86 S.Ct.1440, 16 L. Ed.2d 536].) While such acknowledgment is not necessarily a holding on the subject (since the language is used in a consideration of evidence of pandering), four decisions of U.S. Courts of Appeal have held, with hearings in the Supreme Court denied, that expert testimony on community standards is not a *sine qua non* of every obscenity case. (*Womack v. United States* [D.C. Cir. 1961] 294 F.2d 204, cert. den. 365 U.S. 859 [81 S.Ct. 826, 5 L.Ed.2d 822]; *United States v. Wild* [2 Cir. 1969] 422 F.2d 34, cert. den. 402 U.S. 986 [91 S.Ct. 1644, 29 L.Ed.2d 152], reh. den. 403 U.S. 940 [91 S.Ct. 2242, 29 L.Ed.2d 720]; *United States v. Manarite* [2 Cir. 1971] 448 F.2d 583, cert. den. 404 U.S. 947 [92 S.Ct. 281, 285, 287, 298]; *Kahm v. United States* [5 Cir. 1962] 300 F.2d 78, 84-85, cert. den. 369 U.S. 859 [82 S.Ct. 949, 8 L.Ed.2d 18].)

Among decisions reaching the same result, at least in certain types of cases, in state courts are *City of Chicago v. Kimmel* [1964] 31 Ill.2d 202, 206 [201 N.E.2d 386]; *State v. Carlson* [Minn. 1971] 192 N.W. 2d 421, 424; *Mitchum v. State* [Fla.App. 1971] 251 So.2d 298.

We think the California law, in cases where the materials are patently obscene, is in accord. The Supreme

Court in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 446 P.2d 535] imposed the requirement of expert testimony for the prosecution based on a state-wide community standard. However, the court expressly refused to decide whether to adopt an exception from this requirement in patently obscene cases, citing *Womack, supra.* Since *Giannini* [1968] the Legislature has enacted Penal Code section 312.1 providing:

> "In any prosecution for a violation of the provisions of this chapter . . ., neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense."

No decision has examined the validity of this section, but we doubt that the California Supreme Court would (nor has it as of this writing) require expert testimony in patently obscene cases in the face of this enactment (i.e., hold that the requirement of expert testimony is of constitutional dimensions in all obscenity cases) when the United States Supreme Court has not, in the cases cited, required expert testimony in obscenity cases, patent or otherwise, as a constitutional matter.

The only appellate decision in California since *In re Giannini* is consistent with the view that expert testimony is not needed where the material is patently

obscene. (*People v. Garner,* Appellate Department of Superior Court of Santa Clara (Nos. 236 and 237, filed August 4, 1970).)

B. *May a jury disregard defense expert testimony where the material is patently obscene?*

On this aspect of the matter, also, there was no reversible error. In *Womack v. United States, supra,* certain evidence favorable to the defense in a patently obscene case was excluded as irrelevant. The court said:

> "The proffered evidence was immaterial, i.e., of no probative weight in reaching a decision upon the issue at trial. The fact that nudes by Manet, Titian, Raphael, Rembrandt, Picasso, and many others are accepted commercial items is of no possible probative value in deciding whether these particular photographs, which alone are in issue here, are obscene and filthy. If a piece of cloth is bright red, and the cloth itself is in evidence, no testimony, lay or expert, would be admissible to show the cloth is blue. Such testimony would be immaterial, of no probative value, upon the issue of the color. Its admission would be a waste of the court's time, confusing, prolonging, and tending to make a mockery of the processes of justice. Mr. Wigmore treats of this topic in his discussion of relevancy, positing that one of the elements of relevancy is that the proffered evidence have something more than a minimum of probative value. Whether academically we call the principle materiality or relevancy, it is settled that to be admissible a bit of evidence must have some potential probative weight upon the issue of fact under

trial. In the case at bar the photographs were filthy, self-evidently and indisputably. We think that photographs can be so obscene—it is conceivably possible that they be so obscene—that the fact is incontrovertible. These photographs are such." (294 F.2d at 206)

Under *Womack* a jury should also be able to disregard contrary expert testimony in a patently obscene case. *Womack*, of course, goes beyond the instant case since the judgment was affirmed even though certain defense evidence as to community standards was excluded as irrelevant; the jury was not, as in the within case, given the opportunity to consider or disregard it.

The instruction may also be supported with the California law as to the effect of expert testimony in a criminal case. Penal Code section 1127b provides:

"When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

"Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. *The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.*" [Emphasis added.] (See CALJIC Instruction 2.80.)

The challenged instruction told the jury that it could ignore expert testimony on community standards if the material ". . . is so patently offensive as to violate any conceivable community standard. . . ." This is tantamount to the language of section 1127b and of CALJIC Instruction 2.80 that if the jury found such expert testimony to be unreasonable, they could disregard it. If there is any error in the difference in language, we find it not to be prejudicial. (California Constitution, art. VI, § 13.)

We have no hesitancy in holding "The Collection" to be patently obscene. It is about thirty minutes long, yet has little plot and a few words of dialogue. There is no effort to develop any characterization in roles played. Its dominant theme, in a series of loosely connected episodes, is homosexual sex perversion. The various sequences depicting sodomy, oral copulation, masturbation, and other disgusting practices have utterly no literary or dramatic relief. Rather, the effort is to accentuate the stark animalism of the acts involved by showing them as inflicted on the participants after physical struggle, whipping, and other brutality.

The judgment is affirmed.

Dated: Oct. 12, 1972.

/s/ Zack
Judge

I concur:
/s/ Smith
Judge

I dissent.

The challenged instruction permitted the jury to disregard defense evidence of community standards, enabled it to avoid resolving the conflict in expert testimony on the subject presented by People and the defendant, and endowed the jurors with ". . . the prerogative of imposing their own personal standards as to the test of criminality. . . ." (*In re Giannini* [1968] 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535].)

In re Giannini, supra, established the general rule in California that the issue of obscenity cannot be resolved from the questioned material or conduct itself, and that an obscenity conviction cannot stand in the absence of expert testimony of contemporary community standards. The Supreme Court stated at pages 574-575: "We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards. An even-handed application of the criminal law, even with evidentiary guidance (citation), is sufficiently difficult in an area so confusing and intricate as obscenity. To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror."

No decision of our State Supreme Court or Courts of Appeal has established or approved an exception to the general rule requiring proof of contemporary community standards which is part of the constitutional test for obscenity. *Giannini* did leave open the question of whether the so-called "patently obscene" excep-

tion to the general rule should be adopted in California (*supra*, at p. 575, fn. 8). However, in my opinion, the logic of the decision in that case and the reasons assigned for the general rule militate against adoption of the exception with reference to books and motion pictures. In addition to stressing the need for an objective rather than subjective determination of obscenity, the court in *Giannini* noted that the relevant community is the State of California and jurors cannot ". . . understand intuitively how the community as a whole would react to allegedly obscene material" (p. 576), and that proof of community standards is indispensable to effective appellate review since "[a]n appellate court must reach an independent decision as to the obscenity of the material (citation)" and ". . . an appellate court does not in any sense compose a cross-section of the community. . . ." (p. 576). If, as stated in *Giannini*, "standards of obscenity are not immutable" (p. 579) and jurors are not "intrinsically cognizant of community standards" (p. 576), how can jurors know what is, in the words of the instruction under consideration, "so patently offensive as to violate any *conceivable community standard*"? (Emphasis added.)

Even if independent evidence of community standards was unnecessary in some situations, it would be error to instruct the jury that it could disregard the expert testimony on that subject. In *People v. Luros* [1971] 4 Cal.3d 84, 88 [92 Cal.Rptr. 833, 480 P. 2d 633], the Supreme Court quoted with approval the statement in *People v. Aday* [1964] 226 Cal.App.2d 520, 531 [38 Cal.Rptr. 199], that ". . . it is a denial of due process for a trial court not to allow a defendant to prove contemporary community standards at his trial." (See also *In re Harris* [1961] 56 Cal.2d 879,

880 [16 Cal.Rptr. 889, 366 P.2d 305].) To instruct the jury that "expert testimony need not be considered upon . . . [the] issue [of community standards]" in a case where such evidence has been introduced by the defendant would equally seem to be a denial of due process.

I would reverse the judgment because of the erroneous instruction.

Dated: Oct. 12, 1972.

/s/ Katz
Acting Presiding Judge

We certify that the foregoing opinion qualifies for publication in the Official Reports under California Rules of Court, Rule 976(b) in that it establishes a new rule of law and involves a legal issue of continuing public interest.

Dated: Oct. 12, 1972.

BY THE COURT
/s/ Katz
Acting Presiding Judge
/s/ Zack
Judge

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Werner Ernest Enskat, Defendant and Appellant. Superior Court No. CR A 11202, Municipal Court of the Los Angeles Judicial District No. 368363.

Filed: Oct. 12, 1972.

ORDER CERTIFYING CAUSE
TO THE COURT OF APPEAL

Pursuant to Rule 63(a) and (c), California Rules of Court, on this Court's own motion, the above-entitled case is hereby certified to the Court of Appeal, as it appears necessary to settle new and important questions of law.

The questions so presented are:

1. Is expert testimony or other evidence of contemporary community standards necessary to convict under Penal Code section 311.2 in all cases?
2. Where a defendant has introduced expert testimony on the subject of community standards, may the jury be instructed that evidence of community standards is unnecessary and such testimony need not be considered if it finds the material in question is so patently offensive as to violate any conceivable community standard?

In our opinion, from which one judge dissented in a separate opinion, a copy of which opinion is at-

tached hereto, we answered the first question in the negative where the material in question is patently obscene, and the second question in the affirmative, but feel the questions of such importance that they should be reviewed by the higher courts of this State.

Dated: Oct. 12, 1972.

BY THE COURT
/s/ Katz
Acting Presiding Judge
/s/ Zack
Judge
/s/ Whyte
Judge

APPENDIX C.

Opinion and Judgment of the Appellate Department.

The People of the State of California, Plaintiff and Respondent, v. Werner Ernest Enskat, Defendant and Appellant. Cr. A. 10330.

Appellate Department, Superior Court, Los Angeles County, Sept. 21, 1971.

Stanley Fleishman by David M. Brown, Hollywood, for defendant and appellant.

Roger Arnebergh, City Atty., Madeleine Flier, Deputy City Atty., for plaintiff and respondent.

MEMORANDUM OPINION AND JUDGMENT

ZACK, Judge.

The complaint charges appellant with two counts of violations of section 311.2 of the Penal Code in the exhibition, on September 19, 1970, of motion pictures entitled "The Collection," and "Man to Man," respectively. An exhaustive statement of the evidence which led to a conviction on the first count, after jury trial, is unnecessary, except as to the specific issues discussed below. It suffices, at this point, to note that no females were involved in the picture, and that the material involved a potpourri of scenes depicting male genitalia in various conditions arising out of the interaction of the male participants, liberally garnished with depictions of homosexually oriented actual (or suggested) masturbation, flagellation, sodomy, and the like.

But the disgusting nature of the material admittedly exhibited to the public, including the arresting officers, is to be distinguished from the character of the evi-

dence otherwise required by law to sustain convictions in cases of this kind.

The motion picture involved was not seized under a warrant, or otherwise offered or placed in evidence by the prosecution. The officers entered the theater and then took pictures of portions of the film. Such pictures, including pictures of the theater exterior, are People's 1 through 9, 11, and 12. The balance of the film, audio and visual, was the subject of testimony. A best evidence objection was overruled on the ground that the rule does not apply. Such ruling was error.

Evidence Code section 1500 states that "* * * no evidence other than the writing itself is admissible to prove the content of a writing." There is no question but that the contents of the material must be considered in an obscenity case. (A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts (1966) 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1; Landau v. Fording (1966) 245 Cal.App. 2d 820, 54 Cal.Rptr. 177.) Motion pictures are accorded the same constitutional protection as books and other forms of expression. (Burstyn v. Wilson (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.) As the content of a film is always an issue in an obscenity case, the best evidence rule will apply if a film is a writing under the Evidence Code.

Evidence Code section 250 defines a "writing" as including "* * * photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols." A photographic transparency, e. g., a "slide," is a writing under this definition, because it is a picture recorded upon a tangible

thing, the celluloid.[1] A motion picture film is a series of such pictures recorded upon a celluloid film strip. (Cf. Time, Inc. v. Bernard Geis Assoc. (1968) D.C., 293 F.Supp. 130.) Each picture in each frame is slightly different from the preceding one, so that when the film is moved through a projector, these individual pictures appear to merge into a continuous "moving" picture. This movement is only an optical illusion, for in actuality each separate picture is projected onto the screen for a split second, rapidly followed by the next one. That there *appears* to be a "motion picture" does not alter the fact that a series of single pictures on the filmstrip, each one a "writing," is casting an image on a screen.

Respondent argues, however, that it is not the film, but these light images on the screen, that constitute the offense of exhibiting an obscene motion picture. Respondent argues that as this moving image is unrecorded, it cannot be a writing, and therefore is not subject to the best evidence rule. This argument ignores the essential fact that the moving image is merely the consequence of passing a writing (the film) through a machine. Without the projector and the filmstrip, no moving image is cast at all. The content of the moving image, "evanescent" or not, is totally dependent upon the content of the filmstrip. Just as it is better for the trier of fact to read a document than have it described, it is better for the trier of fact to see a movie

[1]A photograph printed from a negative is still considered secondary evidence. (Hopkins v. Hopkins (1958) 157 Cal.App. 2d 313, 320 P.2d 918.)

than have it described. The policy considerations upholding the rule for written documents apply with full force to movies as well. It is to be noted that the instant prosecution under Penal Code section 311.2 is for exhibiting *obscene matter*. The latter is defined in section 311, subdivisions (a)(2), (b) to include a "motion picture." It is the character of the contents of the motion picture exhibited which, strictly speaking, is in issue, not the character of the images on the screen resulting from its exhibition.

Our ruling herein does not mean that obscenity cases may not, under any circumstances, be prosecuted by means of secondary evidence of the obscene material. It means that in this case, the prosecution, in presenting such secondary evidence, did not comply with the Evidence Code. An example of how the prosecution may proceed is contained in Evidence Code section 1503, subdivision (a): If (1) a defendant is in possession or control of the material at the time he is expressly or impliedly notified of the existence of a criminal action against him involving such alleged obscene material, and (2) if a request that he produce it is made at the trial (out of the presence of the jury), secondary evidence can be used.

But the prosecution has, as does the proponent of secondary evidence in any civil or criminal case, the burden of making a prima facie showing as to both (1) and (2). (See People v. Chapman (1921) 55 Cal.App. 192 at 201, 203 P. 126.) Here, the proponent of the secondary evidence made no factual showing

as to (1) nor did it do (2). Nor did the proponent attempt to make any other showing which might be construed as a foundation for use of secondary evidence other than the example we have mentioned.

Unlike the result in *Chapman, supra,* the secondary evidence improperly admitted here was the only evidence of the contents of the material, and, unlike other cases of improper admission or exclusion of cumulative evidence, had to be prejudicial.

The judgment is reversed, and the cause remanded for a new trial.

WHYTE, P. J., and KATZ, J., concur.

APPENDIX D.

Order of Supreme Court Denying Hearing.

Clerk's Office, Supreme Court, 4250 State Building.
San Francisco, California 94102
October 24, 1973.

I have this day filed Order HEARING DENIED.

In re: 2 Crim. No. 22506 People vs. Enskat.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of California Penal Code §311 are as follows:

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation or such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(Added by Stats.1961, c. 2147, p. 4427, § 5. Amended by Stats.1969, c. 249, p. 598, § 1.)

4. The pertinent provisions of California Penal Code §311.2 are as follows:

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

* * *

(Added by Stats.1961, c. 2147, p. 4475, § 5).

APPENDIX F.

Proposed Initiative of 1972.

An act to amend Sections 311 and 313 of the Penal Code, and to add to the Penal Code Chapters 7.7, 7.8 and 7.9, relating to Obscenity.

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE ELECTORS

The Attorney General has prepared a title and summary of the chief purposes and points of the proposed measure, as follows:

OBSCENITY LEGISLATION, INITIATIVE STATUTE. Amends, deletes, and adds Penal Code statutes relating to obscenity. Defines nudity, obscenities, sadomasochistic abuse, sexual conduct, sexual excitement and other related terms. Deletes "redeeming social importance" test. Limits "contemporary standards" test to local area. Creates misdemeanors for selling, showing, producing or distributing specified prohibited materials to adults or minors. Permits local governmental agencies to separately regulate these matters. Provides for county jail term and up to $10,000 fine for violations. Makes sixth conviction of specified misdemeanors a felony. Creates defenses and presumptions. Permits injunctions and seizures of materials. Requires speedy hearing and trial.

SECTION 1. Section 311 of the Penal Code is amended to read:

311. As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to

prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters:

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions, under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

(h) *"Contemporary standards" means the standards generally prevailing in the incorporated area in which the activity complained of occurred. If the area in*

which such activity occurred is unincorporated, "contemporary standards" means the standards generally prevailing within a 10-mile radius of the area in which such activity occurred.

SECTION 2. Section 313 of the Penal Code is amended to read:

313. As used in this chapter:

(a) "Harmful matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in *the* description or representation of such matters to minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial

representation or any statute or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

(h) *"Contemporary standards" means the standards generally prevailing in the incorporated area in which the activity complained of occurred. If the area in which such activity occurred is unincorporated, "contemporary standards" means the standards generally prevailing within a 10-mile radius of the area in which such activity occurred.*

SECTION 3. Section 311.3 is added to the Penal Code, to read:

(a) It is a public nuisance for any person to distribute, offer to sell, loan or exhibit any matter containing any picture, photograph, drawing or other visual representation which explicitly reveals post-pubertal male or female genitals, or which portays or depicts sadomasochistic abuse, sexual excitement or sexual conduct, within one mile measured in a straight line of any building used as a private or public elementary or high school, or of any public park.

(b) Defenses set forth in Section 313.12 of Chapter 7.7 and Section 313.27(b) of Chapter 7.8 of this title shall apply also to this section. The burden of proof in such defenses, by a preponderance of the evidence, shall be upon the defendant.

(c) Definitions for the terms "sadomasochistic abuse," "sexual conduct" and "sexual excitement" which are set forth in Section 313.6 of Chapter 7.7 of this title shall apply to this section.

SECTION 4. Chapter 7.7 (commencing with Section 313.6) is added to Title 9 of Part 1 of the Penal Code, to read:

Chapter 7.7

313.6 AS USED IN CHAPTERS 7.7 and 7.8 of this title:

(a) "Advertising purposes" means purposes of propagandizing in connection with the sale commercially of a product or type of product or products, or the offering commercially of a service, or the exhibiting commercially of an entertainment.

(b) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its contents or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot, or vehicle. It also includes the giving out of handbills in a public thoroughfare, depot, or vehicle.

(c) "Exhibition" shall include, but not be limited to, motion picture and television productions.

(d) "Live public show" means a public show in which human actors, dancers, or other performers,

employees, or other persons appear in person before spectators or customers.

A bona fide drawing, painting, photography, sculpture, or fine print-making class which utilizes human models and which admits only participating instructors, students, and models, and which does not in any way use, display or exhibit sadomasochistic abuse, sexual conduct, sexual excitement, defecation or urination shall not be deemed a live public show.

(e) "Knowingly" means having knowledge of the character of any item or activity described in chapter 7.7 or 7.8 of this title, or having failed to exercise reasonable care to ascertain its character.

(f) "Minor" means any person under the age of eighteen years.

(g) "Nudity" means uncovered post-pubertal human male or female genitals, pubic areas, or buttocks, or the human female breast below a point immediately above the top of the nipple (or the breast with the nipple and immediately adjacent area only covered), or the covered human male penis in a discernibly turgid state.

(h) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, buttocks, or female breasts, or excretory functions or products, or sexual conduct, either that have no other meaning, or that in context are clearly utilized for their bodily, sexual, or excretory meaning. "Words currently generally rejected" are to be determined with reference to prevailing practices in the local community in which the language complained of was used.

(i) "Person" means any person, association, corporation, or business entity, or any employee thereof.

(j) "Public show" means any entertainment or exhibition advertised or in other fashion held out to be accessible to the public, whether or not an admission or other charge is levied or collected.

An entertainment or exhibition shall be deemed a public show although access to it is only granted to members of a club or other association, when membership in such organization is obtained upon payment of an admission price or contribution or token dues or other small fee, and the organization in fact exists primarily for sponsoring or arranging admissions to such performances.

(k) "Public thoroughfare, depot, or vehicle" means any street, highway, park, arcade, depot, or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation or authority, or owned or operated by an agency of public transportation, that is designed for the use, enjoyment, or transportation of the citizenry.

(l) "Sadomasochistic abuse" means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, tied or in similar fashion restrained.

(m) "Sells or offers to sell" means giving or offering for monetary consideration or other valuable commodity or services.

(n) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals,

pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification. "Sexual conduct" shall include the touching of the genitals of an animal in an act of apparent sexual stimulation or gratification.

(o) "Sexual excitement" means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity or sadomasochistic abuse.

313.7. Any person shall be guilty of a misdemeanor who, in any capacity, knowingly directs, gives, manages, participates in, prepares, or presents, or who employs others so to do, any live public show explicitly showing sadomasochistic abuse, sexual conduct, or nudity, or containing explicit verbal descriptions or narrative accounts of sadomasochistic abuse, sexual conduct, or sexual excitement or utilizing obscenities.

313.8. Any person shall be guilty of a misdemeanor who, in any capacity, knowingly:

(a) Directs, distributes, exhibits, manages, photographs, produces, sells, or shows, or possesses with intent to sell or to show, or participates in the creation, presentation, sale, or transfer, of any motion picture, television production, or of any photograph, or any book, magazine, or other item, containing one or more photographs, of humans:

(1) That, showing sadomasochistic abuse, sexual conduct, or defecation or urination, explicitly reveals genital areas; or

(2) That, intended to be presented at a public show, explicitly reveals acts of sadomasochistic abuse, sexual conduct, defecation, or urination, or persons so positioned as to appear to be engaged in such conduct, and that shows the nude or nearly nude body, although genital areas are not pictured; or

(3) That utilizes obscenities

(b) With intent to present it at a public show, directs, distributes, exhibits, manages, photographs, produces, sells, shows, or possesses, or participates in the creation, presentation, sale, or transfer, of any motion picture or television production of humans:

(1) That explicitly reveals genital areas; or

(2) That either reveals sexual acts of homosexual or bestial contact, or that shows the participants in or witnesses to such suggested acts moments prior to, or during, or moments after such suggested acts.

(c) Draws, exhibits, paints, presents, sculpts, sells, shows, or participates in the creation or presentation of any drawing, picture, sculpture, or other essentially nonphotographic visual representation or other image, or any book, magazine, or other item containing one or more such images that presented at a public show, shows sadomasochistic abuse, sexual conduct, sexual excitement, defecation, or urination, so as to reveal genital areas.

313.9. Any person shall be guilty of a misdemeanor who, in any capacity, knowingly distributes, leases, sells, or otherwise commercially markets or rents any book, magazine, pamphlet, paperback, or other written or printed matter however reproduced, or any sound recording, or who possesses such item for purposes of

so disposing of it, under circumstances demonstrating his intention to exploit commercially a morbid interest in sadomasochistic abuse, sexual conduct, sexual excitement, defecation, or urination. Among those circumstances that may, taken together, serve to demonstrate the actor's intention are:

(a) The content of the item with regard to materials it contains in the enumerated proscribed areas.

(b) The content of the item, if any, apart from those materials it contains in the enumerated proscribed areas, and the relative significance of that content in the advertising or marketing of the item.

(c) The artistic, scientific, historical, or other social values of the item, and the relative significance of such values in the advertising or marketing of the item.

(d) The general character of the advertising or marketing of the item, and that of other items jointly advertised or marketed with the item.

(e) The format, price, and distribution of the item.

313.10. Every person is guilty of a misdemeanor who

(a) Sings or speaks any song, ballad, or other combination of words which describes or depicts sadomasochistic abuse, sexual conduct, sexual excitement, defecation or urination, or which uses obscenities, in any public show, live public show, motion picture, television production, or other exhibition or medium reproducing human conduct, or in any public place.

(b) Procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing such conduct.

313.11. (a) There is a rebuttable presumption applicable to the foregoing provisions of this chapter that any person owning, operating, or employed in the business of selling, offering for sale, renting, or exhibiting any of the materials proscribed by this chapter has knowledge of the contents of all such materials offered for sale, delivered from, exhibited, shown, rented or displayed in the premises owned or operated by him or in which he is employed.

(b) The provisions of this section shall not apply where the defendant makes a showing that, at the time of his arrest:

(1) He was a salaried employee of the business, and

(2) He had no interest in the business beyond his salary or wage, and

(3) He was under the direct personal supervision of an owner, manager or operator of the business, who is a resident of this state and who is not exempt from prosecution under the provisions of this chapter.

313.12. The following shall be defenses to the charges enumerated in the foregoing sections of this chapter, the burden of proof of which, by a preponderance of the evidence, shall be upon the defendant:

(a) That those aspects of any item that would otherwise appear to be actionable under this chapter form merely a minor and incidental part of an otherwise non-offending whole, and that sexual titillation is not one of their primary purposes, except that no sexual conduct beyond an apparent touching of the unexposed buttocks or female breast be permitted in any live public show, nor shall any sexual conduct that explicitly reveals genital areas be permitted in any pub-

lic show, nor shall any book, magazine, or other item contain any photograph of humans that, showing sado-masochistic abuse, sexual conduct, defecation or urination, explicitly reveals genital areas.

(b) That sexual titillation is not a primary purpose of those aspects of any item that would otherwise appear to be actionable under this chapter, and that such aspects are essential to the accomplishment of such primary purpose or purposes, and that a bona fide governmental, scientific, or other similar justification for defendant's conduct relating to such aspects of such items exists, demonstrated by the content, format, and price of the work itself, the circumstances of the item's marketing and intended use, and the defendant's conduct concerning it.

313.13. If any provision of this chapter or the application of this chapter to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

SECTION 5. Chapter 7.8 (commencing with Section 313.20) is added to Title 9 of Part 1, Chapter 7.8.

313.20. Definitions appearing in Section 313.6 of Chapter 7.7 of Title 9 of Part 1 of this Code shall apply to this chapter.

313.21. Any person shall be guilty of a misdemeanor who knowingly sells or offers to sell to a minor any of the following:

(a) Any picture, photograph, drawing, sculpture, motion picture, film, or other visual representation or

image of a person or portion of the human body that depicts nudity, sadomasochistic abuse, sexual conduct, or sexual excitement; or

(b) Any book, magazine, paperback, pamphlet, or other written or printed matter however reproduced, or any sound recording, which contains any matter enumerated in the immediately preceding paragraph, or obscenities, or explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement, or sadomasochistic abuse.

313.22. Any person shall be guilty of a misdemeanor who, for a monetary consideration or other valuable commodity or service, within this state, arranges for or dispatches for delivery directly to any minor, whether the delivery is to be made within or outside of this state, any of the materials enumerated in Section 313.21. However, unless the defendant either was informed or had reason to suspect that the customer or prospective customer was a minor, he shall not be guilty of a misdemeanor when he has caused to be printed on the outer package, wrapper, or cover of the merchandise to be delivered, in words or substance. "This package (wrapper) (publication) contains material that, by California law, may not be sold directly to a minor." This section does not render the carrier's conduct, or that of its agents or employees, criminal.

313.23. Any person shall be guilty of a misdemeanor who, for a monetary consideration or other valuable commodity or service, knowingly exhibits to a minor, or knowingly sells or offers to sell to a minor an admission ticket or other means to gain entrance to, or knowingly admits a minor to premises whereon there is exhibited a motion picture, show, or other pre-

sentation, whether pictured, animated, or live, which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, or the participants in or onlookers at acts in progress of sadomasochistic abuse or sexual conduct, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

313.24. Any person shall be guilty of a misdemeanor who, while either operating or being employed in a sales, cashier, or managerial capacity in any retail establishment, knowingly suffers or permits a minor to enter or remain on such premises, if therein in that portion where the minor is present:

(a) Any picture, photograph, drawing, sculpture, or other visual representation or image of a person or portion of the human body that depicts nudity, sexual conduct, sadomasochistic abuse, defecation or urination is visibly displayed.

(b) Any book, magazine, pamphlet, paperback or other written or printed matter however reproduced is so displayed that it visibly reveals a person or portion of the human body depicting nudity, sexual conduct, sadomasochistic abuse, defecation or urination.

313.25. The following rebuttable presumptions shall apply to the foregoing provisions of this chapter:

(a) Any person owning, operating, or employed in the business of selling, offering for sale, renting, or exhibiting any of the materials proscribed by this chapter shall be presumed to have knowledge of the contents of all such materials offered for sale, delivered from, exhibited, shown, rented, or displayed in the premises owned or operated by him or in which he is employed.

(b) The sale, offer to sell, exhibition, show, or display to a minor of any of the items proscribed by this chapter, shall be presumptive evidence that the defendant knew that the person was a minor.

The provisions of paragraph (a) of this section shall not apply where the defendant makes a showing that, at the time of his arrest:

(1) He was a salaried employee of the business, and

(2) He had no interest in the business beyond his salary or wage, and

(3) He was under the direct personal supervision of an owner, manager or operator of the business, who is a resident of this state and who is not exempt from prosecution under the provisions of this chapter.

313.26. The following shall be defenses to the charges enumerated in the foregoing sections of this chapter, the burden of proof of which, by a preponderance of the evidence, shall be upon the defendant:

(a) That from the minor's appearance the defendant had no reason to suspect that the minor was under 18 years of age, or that if he had reason to or did so suspect, he made reasonable efforts to determine the minor's age. Reasonable effort shall not consist of merely asking the minor his age.

(b) That sexual titillation is not a primary purpose of those aspects of any item that otherwise would appear to be actionable under this chapter and that defendant was a bona fide school, museum, art gallery or public library, or was acting in his capacity as an employee of such organization or of a retail outlet affiliated with and serving the educational purposes of such organization.

(c) That sexual titillation is not a primary purpose of those aspects of any item that otherwise would appear to be actionable under this chapter and that such aspects form merely a minor and incidental part of an otherwise non-offending whole, except that under no circumstances shall sadomashochistic abuse, defecation, urination or sexual conduct beyond an apparent touching of the unexposed buttocks or female breast be permitted in any live public show, nor shall any sadomasochistic abuse, sexual conduct that explicitly reveals genital areas, defecation or urination be permitted in any public show, nor shall any book, magazine or other item contain any photograph of humans that shows sadomasochistic abuse, sexual conduct that explicitly reveals genital areas, defecation or urination.

313.27. Any person shall be guilty of a misdemeanor who knowingly shows, presents or exhibits outdoors, or who knowingly aids or assists in the showing, presentation or exhibition outdoors, of any motion picture, slide presentation or live public show which is visible from any public street or highway or from any other place where such showing, presentation or exhibition may be visible to a minor, and which depicts or reveals nudity, sexual conduct, sexual excitement, defecation, urination or sadomasochistic abuse, or the participants in or onlookers at acts in progress of sadomasochistic abuse or sexual conduct, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct, which may be audible to a minor.

The provisions of Section 313.25 shall apply to this section.

313.28. Every person who, with knowledge that a person is a minor under 18 years of age, or who,

while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Chapter 7.7 or 7.8 of this title is guilty of a misdemeanor.

313.29. Every person, who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be materials proscribed by Chapter 7.7 or 7.8 of this title, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a misdemeanor.

313.30(a) Every person who is authorized to arrest any person for a violation of Chapter 7.7 or 7.8 of this title is equally authorized to seize any materials proscribed by such chapters found in the possession or under the control of the person so arrested and to deliver them to the court before whom the person so arrested is required to be taken.

(b) If the seizure be controverted by any interested person, the court to whom any materials proscribed by such chapters is delivered pursuant to the foregoing paragraph or to the return of a search warrant must within one day after service upon the prosecuting attorney of a motion to suppress the evidence or restore the matter, proceed to take testimony in relation thereto. A decision as to whether there is probable cause to believe the seized material to be material proscribed

by Chapter 7.7 or 7.8 of this title shall be rendered by the court within two days of the conclusion of the restoration proceedings.

If the motion to suppress the evidence is granted on the grounds of an unlawful seizure, the property shall be restored, unless it is subject to confiscation as contraband, as provided for in Section 313.31 in which case it shall not be returned.

313.31. (a) Materials proscribed by Chapter 7.7 or 7.8 of this title and advertisements for matter represented to be such materials are contraband and shall be destroyed.

(b) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgment becomes final, order, upon five days' notice to the defendant, any materials or advertisement, in respect to which the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal.

313.32. Chapters 7.5, 7.6, 7.7, 7.8 and 7.9 of this title do not occupy the field in the regulation of the materials and conduct proscribed by such chapters, and counties, cities, and other political subdivisions of

this state are hereby specifically given the right to further regulate such materials and conduct.

313.33. (a) Every person who violates any provision of Chapter 7.7 or Chapter 7.8 of this title, is punishable by fine of not more than two thousand ($2,000.) or by imprisonment in the county jail for not more than six months, or both such fine and such imprisonment.

(b) If such person previously has been convicted of any violation of Section 313.7, 313.8, 313.9 or 313.10 of Chapter 7.7 or of any violation of Section 313.21, 313.22, 313.23 or 313.28 of Chapter 7.8, or of any violation of Section 311.2, 311.4, 311.6 or 311.7 of Chapter 7.5 or of any violation of Section 313.1 of Chapter 7.6, all chapters of this title, he is punishable by a fine of not more than ten thousand dollars ($10,000.) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment.

(c) If such person previously has been convicted five or more times under any of the sections enumerated in paragraph (b) of this section, he is punishable by imprisonment in the state prison for not more than five years.

313.34. If any provision of chapter 7.7 or 7.8 of this title or the application of such chapter to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application and to this end the provisions of this chapter are declared to be severable.

SECTION 6. Chapter 7.9 (commencing with Section 313.50) is added to Title 9 of Part I of the Penal Code, to read:

CHAPTER 7.9. INJUNCTIVE RELIEF

313.50. The superior courts of the State of California have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article, or the public showing of any motion picture film, slide, exhibit, or performance which is prohibited under Chapters 7.5, 7.6, 7.7 or 7.8 of this title.

313.51. The district attorney of any county in this state in which a person, firm, or corporation sells or distributes, or is about to sell or distribute, or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing, photograph, or other publication or matter which is prohibited by the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of any such prohibited publications or articles.

313.52. The district attorney of any county in this state in which a person, firm, or corporation shows publicly, or is about to show publicly, or is about to acquire possession with intent to show publicly any motion picture film, slide, exhibit, or performance which is prohibited under the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the public showing or further public showing of such prohibited matter or activity.

313.53. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall

be rendered by the court within two days after the conclusion of the trial.

313.54. In the event that an order or judgment be entered in favor of the district attorney and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in Section 313.51 or 313.52, and such sheriff or officer shall be directed to seize and destroy the same, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal.

313.55. In any action brought pursuant to the provisions of this chapter, the district attorney is not required to file any bond before the issuance of an injunction order provided for by this chapter, is not liable for costs, and is not liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm, or corporation sought to be enjoined.

313.56. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE ELECTORS

The Attorney General has prepared a title and summary of the chief purposes and points of the proposed measure, as follows:

OBSCENITY LEGISLATION. INITIATIVE STATUTE. Amends, deletes, and adds Penal Code statutes relating to obscenity. Defines nudity, obscenities, sadomasochistic abuse, sexual conduct, sexual excitement and other related terms. Deletes "redeeming social importance" test. Limits "contemporary standards" test to local area. Creates misdemeanors for selling, showing, producing or distributing specified prohibited materials to adults or minors. Permits local governmental agencies to separately regulate these matters. Provides for county jail term and up to $10,000 fine for violations. Makes sixth conviction of specified misdemeanors a felony. Creates defenses and presumptions. Permits injunctions and seizures of materials. Requires speedy hearing and trial.

For County Use		Date of Signing	Fill In Precinct
	1. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	2. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	3. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	4. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	5. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	6. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	7. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	
	8. Signature of Registered Voter..... Street and Number.....City or Town.....	/ 72	

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1136

WARNER ERNEST ENSKAT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal of the State of California, entered

against Petitioner in the above-entitled case on August 8, 1973, not issue.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Five, rendered on August 8, 1973, is reported in 33 Cal. App. 3d 900, 109 Cal. Rptr. 433. A copy of the opinion appears in Appendix A of Petitioner's petition. The Petitioner has also appended to his petition other prior opinions in this case which either are vacated or moot.

JURISDICTION

The judgment of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five (Petitioner's Appendix A) was entered on August 8, 1973. A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was

denied on October 24, 1973. A copy of the order denying the petition for hearing by the California Supreme Court appears in Appendix D hereto. The judgment of the Court of Appeal, as aforestated, is a final judgment, and jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's conviction in this case, for violation of California Penal Code § 311.2, is violative of the First and Fourteenth Amendment and the decisions of this court rendered on June 21, 1973, in Miller v. California, __U.S. ___, 37 L.Ed.2d 419, 93 S.Ct. 2607, et al.

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance", renders California Penal Code Section 311.2 violative of the First and Fourteenth Amendments because of

vagueness, ambiguity, uncertainty and overbreadth.

3. Whether Petitioner's conviction, based on statewide contemporary standards of prurient interests and customary limits of candor, rather than national standards, violates the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code Sections 311 and 311.2, which do not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the court below held that California Penal Code Sections 311 and 311.2 were not required to specifically define sexual conduct as long as said sections retained the test of "utterly without redeeming social importan-

ce", and, if it so held, whether said holding was correct under the First and Fourteenth Amendments and this court's decisions of June 21, 1973, in Miller, et al.

6. Whether the decision of the court below was correct in ruling that California Penal Code Sections 311 and 311.2 had been "authoritatively construed" as required by this court in Miller, et al.

7. Whether the court below held that California Penal Code Sections 311 and 311.2 were constitutional regardless of whether or not they had been "authoritatively construed", on the ground that the California statute establishes more stringent standard of proof for the prosecution, and therefore satisfies the requirements of Miller, et al, and if it so held, whether said holding was correct.

8. Whether provisions of California law which allegedly allow jurors to disregard so-called "expert" evidence of community stand-

ards are violative of the First and Fourteen-the Amendments.

9. Whether the matter exhibited by the Petitioner, which resulted in his conviction, was obscene.

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code Sections 311 and 311.2 appear in Appoendix E of Petitioner's petition.

California Penal Code Section 312.1 states:

> "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning

the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question or redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense. (Added by Stats. 1969, c. 925, p. 1854, § 1. Amended by Stats. 1970, c. 1072, p. 1910, § 3.)"

California Penal Code Section 1127b states:

"When, in any criminal trial or proceeding, the opinion of any

expert witness is received in evidence, the court shall instruct the jury substantially as follows:

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

No further instruction on the subject of opinion evidence need be

given. (Added by Stats. 1929, c. 876, p. 1939, § 1.)"

STATEMENT OF THE CASE

Petitioner was charged with two counts of violating California Penal Code §311.2 by the exhibition at the Avon Theatre in the County of Los Angeles on September 19, 1970, of motion pictures entitled "The Collection" and "Man to Man." Following a trial by jury, petitioner was convicted with respect to the film "The Collection", and was acquitted with respect to the film "Man to Man." On appeal, the judgment of conviction was reversed and the cause remanded for a new trial because secondary evidence of the film's contents had been improperly admitted. (Petitioner's Appendix C). A subsequent retrial again resulted in conviction and appeal was once more prosecuted to the Appellate Department of the Superior Court of the State of California for the County of Los Ange-

les. The judgment of conviction was affirmed (Petitioner's Appendix B) The Appellate Department, however, certified that a transfer of the appeal to the Court of Appeal appeared necessary to settle new and important questions of law. (Petitioner's Appendix B) On October 24, 1972, the Court of Appeal ordered that the case be transferred to Division Five and the case was submitted for decision by order of the Court of Appeal on May 31, 1973. Thereafter, on July 6, 1973, a communication was received from the Court of Appeal to respective counsel, reading as follows:

> "After studying the recent United States Supreme Court opinions on the subject of obscenity (Miller v. California, 41 L.W. 4925, et al.,) the court has come to the conclusion that fairness to all concerned demands a reargument of this case. It has been set down for July 25, 1973, at 2:30 p.m.

"The court has asked me to advise you that it is most definitely not requesting a reargument on issues already presented and argued. It is, however, interested to what extent--if any--the Miller decisions affect the pending appeal."

Accordingly, there was further briefing and argument before the Court of Appeal and an ultimate ruling by the Court affirming petitioner's judgment of conviction (Petitioner's Appendix A).

A due and timely petition for hearing by the California Supreme Court, after decision by the said Court of Appeal, was denied on October 24, 1973 (Petitioner's Appendix D).

REASONS FOR DENYING THE WRIT

1. California Penal Code Sections 311 and 311.2 defines as obscene matter which, taken

as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner, that the statute solely embodies the test set forth in Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, inasmuch as it was enacted in 1961 and Memoirs was decided in 1966, some five years later. The California legislature merely adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 as one of the elements of the crime set

forth in Penal Code Section 311.2. (Zeitlin v. Arnebergh [1963] 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800.

The court below did not speak to the question of whether California Penal Code Section 311 was specific enough on its face to meet the requirements of Miller, et al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The Court below did not consider whether the California statute, on its face, was directed at depiction of defined sexual conduct, as opposed to expression (Miller v. California, 37 L. Ed. 2d at 430, fn. 6), or whether it was an existing state statute which "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices"(Miller v. California, 37 L. Ed. 2d at 433, fn. 10). While Miller has been apparently interpreted as inferring that California Penal Code Section 311 is not

specific enough on its face, Petitioner submits that it is somewhat more specific than other statutes which have been saved, such as 19 USC §1305(a) and 18 USC §1462 (U.S. v. 12 200-Ft. Reels, __U.S.__, 37 L.Ed.2d 500, 507, fn. 7, 93 S.Ct. 2665). Respondent submits that the more specific the statutes, the better its chances of validity in light of valid construction. Petitioner has appended legislation which was defeated by California voters by better than a 2-1 margin, which was somewhat more specific in its definitions, indicating to Respondent that perhaps two-thirds of California voters felt that Section 311 was already specific enough.

In any event, the court below ruled that California Penal Code Section 311 and 311.2, as they had been authoritatively construed in the past, were valid in light of Miller, et al. With this conclusion, Petitioner agrees.

2. Part of the test of obscenity under which Petitioner was convicted was the requirement

that the matter be shown to be "utterly without redeeming social importance." As this court correctly pointed out in Miller (37 L. Ed. 2d at 429), this test called on the prosecution to prove a negative, "--a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case, and the test of which Petitioner now complains is one which, until now, he has been content, if not delighted, to live with for 13 years.

Petitioner has seized upon the fact that this court reduced the prosecution's burden to claim that California's statute, containing, as it does, such a test, is obviously unconstitutional on its face. The most direct answer to this claim is that if it were correct, this court would have so held in Miller, supra, and in Kaplan v. California ___U. S. ___, 37 L. Ed. 2d 492, 93 S. Ct. 2680.

What this court did with regard to the test

is that it said it is no longer required as stated, and made permissible a new element which is both more realistic, more semantically intelligible, and, as a consequence, easier for the prosecution to establish. The initiative proposal set forth in Petitioner's Appendix F, which he cites with such approval, while perpetuating the language he is suddenly arguing is vague, would not have met the Miller requirements of social value.

Petitioner submits that nothing this court said in Miller, et al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was utterly without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted, and his conviction was obtained, upon a theory that a national standard of First Amendment protection applied. (Miller v. California, __U.S.__, 37 L.Ed.2d at 435). Also, as in Miller, proof

of contemporary standards of prurient interest and customary limits of candor, the so-called "community standard", was of such standards as they existed in the entire State of California, and not of some smaller area or of the entire nation. Both of these concepts were approved by this court in Miller, et al., and both of them continue to be applied in California today. It seems to Respondent that Petitioner fails to distinguish between the two concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this court left unsettled the question of how small a geographic area may be and still establish a viable standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the stan-

dard of First Amendment protection may end up as small as a jury box. Respondent doubts that Petitioner seriously desires this.

4. There exists no express authority for Petitioner's proposition that California Penal Code Sections 311 and 311.2 do not on their face meet the specificity requirements of Miller. Rather, it must be inferred from this court's opinions in Miller and Kaplan, and from the fact that the court below address itself only to the question of how the statute had been construed. Since this court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles Superior Court in Kaplan, Petitioner's argument that the statute is not specific on its face is without merit because it does not address itself to the question of whether it has been properly construed.

5. Petitioner seems to argue as if his case were tried according to the standards set forth

in Miller, et al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was requested to "substitute its own subjective and unguided predilections" or "licensed to create its own law of the case, its own personal standards." The falsity of this contention is demonstrated by the fact that Petitioner makes this astounding allegation for the first time in his petition to this court.

In Miller, et al., it is implicit that a conviction under California Penal Code Section 311.2 could be sustained, at the very least, if the statute had been authoritatively construed as was the statute in United States v. 12 200-Ft. Reels, supra. The court below determined that California's obscenity statutes had been so "authoritatively construed" and Respondent submits

that Petitioner's contention in this regard lacks merit.

6. On June 21, 1973, when this court decided Miller, et al., Petitioner's case was pending decision in the California Court of Appeal. Logically, following the decisions of this court, the Court of Appeal undertook to determine in Petitioner's case that which this court directed in Miller and Kaplan. Petitioner would have this court believe that the court below held that it was not bound to follow Miller if it retained he "utterly without redeeming social importance test" (Petitioner's Appendix A, p. 13). In doing so, Petitioner quotes dicta of the court completely out of context. The court below made the quoted remark in considering and rejecting Petitioner's contention there that the California statute was unconstitutional because it contained said test.

The holding of the court below, insofar as Miller is concerned, is:

"In sum, as to the issues raised by Miller v. California and its companion decisions, we hold (1) that section 311 as heretofore construed, defines obscene matter as required by Miller, except as to Miller's tolerance of an obscenity finding as to matter which is not utterly without redeeming social importance; (2) that while the work in question here meets the Miller test of lacking serious literary, artistic and other values, we cannot apply that yardstick to it, but instead must measure it against the concept of being 'utterly without redeeming social importance'; (3) that such measurement is still permissible; and (4) that so measured, the film which appellant was convicted of exhibiting is obscene."

Petitioner's Appendix A, p. 16;

Emphasis added.)

The opinion of the court below, taken as a whole rather than one sentence out of context, clearly shows that (1) the court followed Miller and looked to see if the California obscenity statutes had been authoritatively construed; (2) the court did not hold that Miller did not require that the statute be authoritatively construed if it retained the test of "utterly without redeeming social importance."

7. As previously stated, the court below held that, prior to the date Petitioner violated California Penal Code Section 311.2, California's obscenity statutes had been authoritatively construed in such a manner as satisfied the requirements of Miller, et al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of

Appeal and the California Supreme Court.

In the first place, it seems to Respondent that this court intended by its orders in Miller, et al., that the question be left to state courts to decide. Petitioner has made no showing that the California Supreme Court and Court of Appeal are not to be trusted to carry out the mandate of this court.

To grant this petition would be tantamount to an expression of willingness by this court to review practically every previous obscenity case from each of the 50 states of the Union.

Second, it seems clear from the opinion of the court below that it was correct in holding that the California obscenity statute had been authoritatively construed so as to meet requirements even more stringent than those imposed by Miller and United States v. 12 200 Ft. Reels.

Third, at Petitioner's trial the jury was instructed that California's obscenity statutes applied only to depictions of sexual activity which

appeal to prurient interest, and it was instructed also by reading to it a prior "authoritative construction" which specifically defined the type of matter regulated (Petitioner's Appendix A, p. 11, fn. 10).

Finally, Petitioner urges that an "authoritative judicial construction" could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. Petitioner cites no authority for this proposition, but if it were true, Respondent suspects this court would have referred Miller and Kaplan to the California Supreme Court rather than to the Superior Court Appellate Departments, which, according to Petitioner have no "authority." Petitioner misunderstands this court's rulings of June 21, 1973, if he believes they held prior requirements for judging obscenity constitutionally deficient; this court would

have reversed, rather than remanding. This court remanded for the purpose of the state court determing whether its statute had been properly construed; in California's case the court's instructions were carried out and the question is properly settled.

9. Respondent does not believe Petitioner's argument regarding expert testimony presents a federal question. While Kaplan made allowance for the introduction of expert testimony by a defendant, Petitioner here did in fact introduce such testimony, and such testimony was admitted. As this court made clear in Paris Adult Theatre v. Slaton, ___U.S.__, 37 L.Ed. 2d 446, 456, 93 S.Ct. 2628 [ft. 6], such testimony is not conclusive or binding on the jury.

In Petitioner's case, the jury was instructed that it must consider all the evidence, and then it might reject the expert evidence of community standards [of prurient interest and limits of candor]. It was also instructed pursuant

to California Penal Code Section 1127b, infra.

Contrary to Petitioner's inference, California Penal Code Section 312.1 required that he be allowed to introduce expert testimony, and he did. The alternative to his argument against allowing the jury to reject it is to tell the jury it must accept and follow defendant's expert testimony. If such were the proper course, there would not have been much point in trying the Petitioner in the first place.

The instructions merely explained to the jurors how they might deal with such expert testimony if the matter was so patently offensive that the testimony was patently incredible.

10. The film upon which Petitioner's conviction rests is obscene under the First and Fourteenth Amendments and in fact. Respondent calculates that it has been adjudged obscene, either expressly or inferentially, by no less than 24 jurors and 19 California state judges. Enough is enough. The court below

understated matters when it stated "the film graphically depicts homosexual activities of four males." The only purpose in this court reviewing the film itself for an independent determination of obscenity would be to establish a new extreme of judicial experience; in addition to the usual scenes of fellatio and sodomy, it graphically depicts a form of coprophagy.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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